(21,086.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 111.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 CAPTION.

In the Supreme Court of Arkansas.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
versus
THE STATE OF ARKANSAS, Appellee.

Pleas and Proceedings Had Before Hon. Eugene Langford, Judge of the Arkansas Circuit Court, at November Term, 1906.

Filed Jan'y 18th, 1907.
SUPS. P. D. ENGLISH, *Clerk.*

2 *Complaint.*

STATE OF ARKANSAS,
County of Arkansas:

In the Arkansas Circuit Court, April Term, 1906.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Complaint at Law.

The State of Arkansas, plaintiff above named, through the undersigned prosecuting attorney of the 17th Judicial District thereof, complains of the St. Louis & Southwestern Railway Company, the defendant above named, and for cause of action states:

That the said defendant is a railroad corporation duly organized under the laws of the State of Missouri; that it is engaged in the business of a common carrier and as such is doing business in the State of Arkansas under the laws thereof; that the line of railroad of said defendant operated by it as a common carrier extends through the State of Arkansas through the town of Stuttgart in the County of Arkansas in said State and through all other points and places hereinafter referred to; that the said town of Stuttgart is one of the important places on said line of railroad, and that said defendant maintains a depot, office and station at said place and employs a regular agent therein; that said defendant as a railroad and as a common carrier for hire of all goods, wares, merchandise and all other commodities is subject to the laws of the State of Arkansas regarding railroads, and subject to the orders of the "Railroad Commission of Arkansas."

That on July 19th, 1905, the "Railroad Commission of Arkansas" duly and legally made and rendered an order known as rule
3 number 305 in words and figures as follows, to-wit:

Office of Railroad Commission of Arkansas.

Order No. 305.

Effective August 5th, 1905.

It is ordered by the Commission that its rules be so amended, that when a shipper makes written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within five days from 7 o'clock A. M. the day following such application. Provided, that when a shipper orders a car or cars and does not use the same, he shall pay demurrage for such time as he holds the car or cars, at the rate of $1.00 per car per day, dating from 7 A. M. after the car or cars are placed.

Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than five days' notice thereof, computing from 7 o'clock A. M. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

When freight in car loads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of lading therefor, and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than fifty miles per day of twenty-four hours, computing from 7 o'clock A. M. the second day following receipt of shipment. Provided, that in computing the time of freight in transit, there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or rehandling freight is involved.

The period during which the movement of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed
4 in this rule, and counted as additional free time.

The Commission reserves the right on its own motion to suspend the operation of these rules, or any one or more of them, in whole or in part, whenever it shall appear that justice demands such action, and the Commission will, upon complaint, hear and act upon applications for a like suspension.

Nothing in these rules shall apply to shipment of live stock and perishable freight where the rules of this Commission or the laws of the State require the more prompt furnishing of cars or movement of freight than provided for by these rules.

By order of the Commission.

Little Rock, Ark., July 19, 1905.

W. E. FLOYD,
Secretary.

That at the times hereinafter referred to, Phillip Reinsch, was a dealer in baled hay and a shipper thereof doing business in Stuttgart,

Arkansas County, Arkansas, and selling and shipping same in car load lots; that baled hay is a character of freight embraced in the tariff of said defendant company and of which a great amount has been for several years received for shipment in car load lots and hauled by said company from Stuttgart, Arkansas, to points both within and without the State; that said Phillip Reinsch made written application to the defendant railroad company for cars to be loaded with baled prairie hay to be shipped in car load lots to points therein designated as the final destination thereof,—the number of cars applied for and the date of said application and final destination of the shipments being as follows:

Oct. 30, 1905, 12 cars for shipment to Texarkana, Ark.
Oct. 30, 1905, 1 car for shipment to Hot Springs, "
Oct. 30, 1905, 1 car for shipment to Anderson, "
Nov. 20, 1905, 15 cars for shipment to Texarkana, "
Dec. 12, 1905, 12 cars for shipment to Texarkana, Ark.
Jan. 20, 1906, 9 cars for shipment to Texarkana, "
Jan. 20, 1906, 1 car for shipment to Hot Springs, "

The said cars were to be furnished within five days from the respective dates aforesaid, but plaintiff alleges that in violation of rule # 305 of the Railroad Commission hereinbefore set out, said defendant did in said county and State aforesaid unlawfully and in disregard of its duty as a carrier fail and refuse to furnish said Phillip Reinsch cars as per application hereinbefore referred to within five days from 7 o'clock of the day following his application, and failed and refused to furnish said cars or any of them at any time.

Thereupon, the said Phillip Reinsch filed his complaint against said defendant with the Railroad Commission of Arkansas charging defendant with violation of said rule # 305 of the Railroad Commission hereinbefore referred to by failure and refusal to furnish cars as hereinbefore alleged, and said complaint duly coming on for hearing before said Commission, the defendant being present by its attorneys, was heard and on the 14th day of February, 1906, the following order was duly made by said Commission, to-wit:

Office of Railroad Commission of Arkansas.

Order # 324.

PHILLIP REINSCH
versus
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

The premises considered, it is adjudged by the Commission that the St. Louis Southwestern Railway Company hath incurred the penalties denounced by the 18th Section of the Act of March, 1899, of this State, creating a Railroad Commission and defining its powers and duties to shippers in disregard of the duties imposed upon it by Section 10 of said Act of March, 1899, and the rules of the Commission governing the transportation of property as outlined in its order effective August 5, 1905, in this, that said carrier did at its

station in the town of Stuttgart, Arkansas, unlawfully and in disregard of its duty as a carrier refuse or fail to furnish cars
6 for hay shipments upon the requisition of the complainant, Phillip Reinsch, said cars being ordered of the agent of the St. Louis Southwestern Railway Company at Stuttgart, Arkansas, to be placed at Stuttgart, Arkansas, as follows:

Oct. 30, 1905,	12	cars for shipment to	Texarkana, Ark.
Oct. 30, 1905,	1	"	Hot Springs, "
Oct. 30, 1905,	1	"	Anderson, "
Nov. 20, 1905,	15	"	Texarkana, "
Dec. 12, 1905,	12	"	Texarkana, "
Jan. 20, 1906,	9	"	Texarkana, "
Jan. 20, 1906,	1	"	Hot Springs, "

It is therefore ordered by the Commission that the State of Arkansas do*th* have and receive of and from the St. Louis Southwestern Railway Company its penalty for disregarding the duties imposed upon it by law, and the rules of the Railroad Commission of this State aforesaid.

And to that end it is ordered by the Commission that the Secretary of this Commission make out a true and perfect transcript of this order, and that same be certified under the seal of this office and forthwith forwarded to the Honorable F. E. Brown, Prosecuting Attorney of the Seventeenth Judicial District of the State of Arkansas

It is further ordered that within fifteen days after the receipt of said transcript that the said Prosecuting Attorney institute suit in the name of the State of Arkansas in Arkansas County Circuit Court against said Railway Company to recover the penalty for its dereliction of duty as aforesaid as in such cases made and provided by law.

I hereby certify that the above is a true and correct copy of an order this day issued by the Railroad Commission of Arkansas.

Given under my hand and the seal of the Railroad Commission of Arkansas, in the City of Little Rock, this the 14th day of
7 February, 1906.

W. E. FLOYD,
Secretary.

The defendant violated said rule # 305 of the Railroad Commission hereinbefore referred to and violated the duty imposed upon it as a common carrier by law in the way and manner hereinbefore set out contrary to the form of the statute in such case made and provided, and by reason thereof has subjected itself to the penalty prescribed by law in such cases made and provided; and that the plaintiff ought to have and recover from said defendant for said violation the maximum penalty of nineteen hundred and fifty dollars.

That in all shipments of grain, hay and other products and of goods and merchandise and all other freight by car load lots it has been and now is customary and was the universal custom at the time requisitions for cars in this cause were made for the shipper to load said cars with the freight to be shipped.

That in all shipments of freight by car load lots it was and has been the rule of the defendant company and it was the rule of defendant at the time the requisitions herein were made that cars must be loaded by the shippers and that hay would not be accepted by defendant for shipment until cars were furnished by it.

Wherefore, Plaintiff prays that it have judgment against the defendant for the said sum of Nineteen hundred and fifty dollars; for its costs herein expended, and attorneys' fees; and all other relief.

(Signed) F. E. BROWN,
Prosecuting Attorney and Attorney for Plaintiff.

Endorsed: "Filed in my office and summons issued this 20th day of March, 1906. C. P. Ball, Clerk."

8 In the Arkansas County Circuit Court.

THE STATE OF ARKANSAS, Plaintiff,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Demurrer.

Comes the defendant, St. Louis Southwestern Railway Company, and demurs to the complaint herein, and for cause says:

1st. Because the facts stated in said complaint are not sufficient to constitute a cause of action against this defendant.

2nd. Because the order of the Railroad Commission set out in the complaint is and was unreasonable, illegal and void.

BRIDGES & WOOLDRIDGE,
Attorneys for Defendant.

Endorsed: "Filed in open Court April 9, 1906. C. P. Ball, Clerk."

9 In the Arkansas Circuit Court.

THE STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Answer.

Comes the defendant by attorney and for answer to plaintiff's complaint herein says:

It admits that it is a railway corporation incorporated under the laws of the State of Missouri and that it operates a line of railway through the State of Arkansas; it admits that the Railroad Commission of Arkansas made and adopted orders Nos. 305 and 324, as set out in plaintiff's complaint, but defendant submits that said Railroad Commission of Arkansas was without authority to make

said orders and that the same were and are illegal and void; that said order 305 is unreasonable and void.

Defendant further answering states that it was at the times complained of in plaintiff's complaint, and is now, operating a line of railway from East St. Louis, in the State of Illinois, to Texarkana, Arkansas, which said line passes through the States of Illinois, Missouri and Arkansas, and a branch line connected with its main line at New Lewisville, Arkansas, and extending to Shreveport, Louisiana; that it was at said dates complained of by plaintiff, and is now, engaged as a common carrier in transporting and carrying interstate commerce in and through said States.

Defendant further answering states that the Phillip Reinsch mentioned in plaintiff's complaint as well as many others were, in the summer and fall of 1905, engaged in buying and shipping hay from the town of Stuttgart to points within and without this State and that a large number of cars are demanded and required by
10 such shippers during the fall and winter season for the shipping of the hay and other product; that during the said fall of 1905 it furnished to the said Reinsch a large number of cars, but says it could not furnish him all the cars at the time ordered as stated in the complaint for the following reasons:

That defendant was at said time, and is now, engaged in transporting interstate shipments of freight of various kinds in the States of Illinois, Missouri, Arkansas and Louisiana and transporting shipments of freight within the States aforesaid; that in interstate shipments of freight the laws of the United States controlled this defendant in furnishing cars and other facilities for the shipment thereof; that at the time the said Reinsch ordered the cars as alleged and for sometime prior thereto and thereafterwards there was an unusual and unexpected demand of defendant for cars for the shipment of various products, such as cotton, cotton seed, wheat, corn, flour, lumber, cattle, horses, hogs and many other classes of freight and "that on account of the extraordinary demand for cars, this defendant was unable to supply all the cars demanded from its various patrons and shippers during the months of October, November and December, 1905, and January, 1906; that under the interstate commerce law, as well as the law of this State, it was the duty of defendant when it could not furnish all the cars demanded not to discriminate in favor of any shipper or any class of shippers along its line of railway; that it apportioned its cars to the various shippers in proportion to their respective wants and needs as fairly and equitably as it was possible for it to do; that defendant furnished the said Reinsch with his full proportion of cars or facilities to ship the products in which he was dealing; that defendant could not on account of unusual demand for cars have furnished the said Reinsch with a greater number of cars than was furnished him without violating the statutes of this State and the interstate commerce law of the United States; that had defendant complied with the
11 demands and orders for cars of the said Reinsch made under the orders of the Railroad Commission as aforesaid, defendant's other shippers and patrons along its line would have been de-

prived of their proportion of cars required by them to ship their products."

Defendant further answering says that the management of defendant company anticipating an increased business along its line of railway for the fall and winter season of 1905 and 1906 endeavored in the month of —— 1905, to place an order for the purchase, manufacture and delivery of two thousand additional freight cars to be delivered during the first part of the fall, 1905, but defendant states that all of the car manufacturers of the United States from which it could have reasonably expected to procure such cars, declined to take and accept defendant's order for the reason that they had orders sufficiently ahead of defendant's to prevent them from delivering the cars desired by defendant within the required time; that failing to procure the additional freight cars desired by defendant, its management thereupon determined to enlarge its general shops at Pine Bluff in this State for the purpose of building and manufacturing its own rolling stock sufficient, if possible, to meet the increased business of said defendant company along its line and to provide as far as possible its patrons and shippers with sufficient cars to ship their products during the busy season of the year in which the business usually becomes congested more or less. That in pursuance of the determination of the management of said defendant company, as aforesaid, said company in the early part of the year, 1906, began the erection and equipment of a large building at its shops in the city of Pine Bluff for the purpose of building and manufacturing additional rolling stock for defendant as aforesaid, which when completed and equipped will cost many thousands of dollars; that said defendant will within a short time have said building completed and equipped and will begin the manufacture
12 of its own freight cars for the purpose of supplying, if possible, the increased demands of shippers along defendant's line of railway.

Defendant for a further answer to plaintiff's complaint says that it is engaged in the carrying, as a common carrer, of interstate shipments and freight through and between the States of Illinois, Missouri, Arkansas and Louisiana as aforesaid and that such shipments constitue a larger part of defendant's business; that under the interstate commerce law of the United States, defendant can not discriminate in the furnishing of cars to interstate shippers, but is required, when it is unable to furnish all the cars demanded by such shippers to make an equitable distribution of its cars to its various shippers making interstate shipments; that during certain seasons of the year the traffic for transportation along defendant's line becomes congested and defendant in such cases is unable to furnish its shippers for interstate shipments, as well as intrastate shippers, all the cars demanded, that if defendant is compelled to obey the said order No. 305 of the Arkansas Railroad Commission, even as to intrastate shipments, this would compel defendant to discriminate against its interstate shippers in the furnishing of cars and defendant would thereby be subjected to heavy penalties under the interstate commerce law of the United States and would operate in favor of and give a pref-

erence to intrastate shippers over interstate shippers along defendant's line. Defendant alleges that said order No. 305, as set out in plaintiff's complaint, is repugnant to and in conflict with the commerce clause of the Constitution and laws of the United States; that said order will operate against and directly burden interstate commerce and is void; that said order is void, because if enforced against defendant it would in effect give an unreasonable and undue preference to state business and would interfere with and regulate interstate traffic; that said order 305 is void because it makes no ex-
13 ceptions for the happening of any contingencies but compels defendant to furnish cars when ordered without any conditions whatever and the same is therefore unreasonable. Said defendant further answering says that said orders number 305 and 324, as set out in plaintiff's complaint, is a taking of your defendant's property without due process of law, and is a denial to it of an equal protection of the laws and in conflict with section one of Art. 14 of the amendment to the Constitution of the United States, and are therefore void.

Having fully answered, defendant prays to be dismissed with its costs.

BRIDGES & WOOLDRIDGE,
Attorneys for Defendant.

Filed in Open Court November 14, 1906.
C. P. BALL, *Clerk.*

14 In the Arkansas Circuit Court.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Amendment to Complaint.

Plaintiff herein by leave of court first asked and obtained hereby states and alleges by way of amendment to its complaint herein that said Phillip Reinsch at the time said requisitions for cars referred to in the complaint herein were made and at all times thereafter was the owner of all the hay that could be shipped in said cars so ordered—said hay being in Stuttgart, Arkansas, awaiting the furnishing of said cars; that plaintiff tendered said hay to defendants for shipment and was ready and willing at all times to pay any and all freight charges thereon.

Wherefore, plaintiff prays as in its original complaint.

F. E. BROWN,
Prosecuting Attorney,
By PETTIT & PETTIT.

Endorsed: "Filed November 10th, 1906. C. P. Ball, Clerk."

Orders Circuit Court.

STATE OF ARKANSAS,
County of Arkansas:

Be it remembered, that at a circuit court begun and held at the court house in the town of De Witt, in said State and County, on Tuesday, April 3rd, 1906, (the Judge hereof having failed to appear to open Court on Monday April 2nd, 1906), the same being the place prescribed by law for holding said court, present and presiding the Hon. George M. Chapline, Judge of the 17th Judicial District of the State of Arkansas, R. F. Parker, Sheriff of said County, and C. P. Ball, Clerk of said Court, being also present, when Court was proclaimed open in due form of law, and the following proceedings were had, to-wit:

On the 5th day of April, 1906, the same being a day of the April Term, 1906, of said court, among other things the following proceedings were had, to-wit:

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Comes the plaintiff, by her attorney, F. E. Brown, and asks leave of the court to amend complaint by interlineation, which is by the court granted.

On the 9th day of April, 1906, the same being a day of the April Term, 1906, of said court, among other things the following proceedings were had, to-wit:

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

16 On this day comes the defendant, by attorneys, Bridges & Wooldridge, and by leave of court file herein their demurrer to complaint of plaintiff.

STATE OF ARKANSAS,
County of Arkansas:

Be it remembered, that at a circuit court begun and held at the court house in the town of De Witt, in said State and County, on Monday, November 5th, 1906, the same being the place and time prescribed by law for holding said court: Present, and presiding the Hon. Eugene Lankford, Judge of the 17th Judicial Circuit of said

State, R. F. Parker, Sheriff of said County, and C. P. Ball, Clerk of said Court; when court was proclaimed open in due form of law, and the following proceedings were had, to-wit:

On the 10th day of November, 1906, the same being a day of the November Term, 1906, of said court, among other things the following proceedings were had, to-wit:

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Now on this day coming on the demurrer of defendant heretofore filed to the complaint herein, comes the plaintiff by attorneys, and the defendant by its attorneys, and after argument of counsel, and the court being sufficiently advised in the premises doth overrule said demurrer; to which ruling of the court defendant at the time excepted, and asked that its exceptions be noted of record, which is accordingly done.

It is ordered by the court that the defendant have until the 14th of this month to file its answer herein.

17 No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

On this day comes the plaintiff, by attorneys, and by leave of the court file- herein amendment to complaint; to the filing of which the defendant by its attorneys at the time excepted.

On the 14th day of November, 1906, the same being a day of the November Term, 1906, of said court, among other things the following proceedings were had, to-wit:

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Comes the defendant, by attorneys, and by leave of court files herein its answer.

On the 17th day of November, 1906, the same being a day of the November Term, 1906, of said Court, among other things the following proceedings were had, to-wit:

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

On this day comes the plaintiff, by her attorneys, F. E. Brown, and Pettit and Pettit, and comes the defendant, by its attorneys, Bridges & Wooldridge, and both parties announce ready for trial; comes a jury, E. H. Hanks, and eleven others taken from the regular panel of the petit jurors, who had previously been sworn ac-
18 cording to law, and who were duly empannelled to try said cause, and after hearing a portion of the evidence introduced were allowed to separate until Monday morning at 8 o'clock November 19th, 1906, under instructions from the court not to talk about the case to any one, or allow any one to talk to them concerning the case, or to talk among each other concerning same.

On the 19th day of November, 1906, the same being a day of the November Term, 1906, of said court, among other things the following proceedings were had, to-wit:

Judgment.

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

On this day the further consideration of this cause is resumed; comes the jury heretofore empannelled and sworn to try this cause, and comes the parties hereto by their respective counsel, and the jury after having heard the evidence and arguments of counsel, consider their verdict, and after due consideration return into court the following verdict:

"We the jury find for plaintiff, and assess penalty at $1375.00.
H. E. HANKS, *Foreman.*"

Therefore, it is considered, ordered and adjudged that the plaintiff, the State of Arkansas, have and recover of and from the said defendant, the St. Louis Southwestern Railway Company, the sum of one thousand three hundred and seventy-five dollars ($1375.00), and all costs herein expended, and interest from this date until paid, for which execution may issue; to which ruling and judgment of the court the defendant excepts, and prays an appeal to the Supreme Court of Arkansas, which is granted.

19 *Appeal.*

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Now on this day comes the defendant, by attorneys, Bridges & Wooldridge, and by leave of Court files herein its motion for a new trial.

No. 1715.

STATE OF ARKANSAS, Plaintiff,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Now on this day coming on to be heard the motion of defendant for a new trial herein, and comes the plaintiff, by attorneys, and the defendant, by its atorneys, and the court being sufficiently advised in the premises, doth overrule the same, to which ruling of the court the defendant at the time duly excepted and asked that its exceptions be noted of record, which is accordingly done, and prayed an appeal from the judgment herein to the Supreme Court, which is by the court granted. It is ordered that the defendant have sixty days to present and file its bill of exceptions herein.

20 In the Arkansas Circuit Court. November Term, 1906.

No. —.

STATE OF ARKANSAS, Plaintiff,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

On the 17th day of November, 1906, this cause coming on for trial before the Hon. Eugene Lankford, Judge of the Seventeenth Judicial District of Arkansas, at De Witt, Arkansas County, Arkansas, the following proceedings were had therein, to-wit:

Present: Pettit & Pettit, F. E. Brown, Attorneys for Pl't'ff, Bridges & Wooldridge, Attorneys for Def't.

A jury was first duly empannelled and sworn to try the said cause.

Whereupon, after opening statements of counsel, the defendant admitting by pleading and in open court that it did not furnish all of the cars ordered by the complainant, Phillip Reinsch, on the dates and within the time mentioned in the complaint, to show cause for its failure so to do, it assumed the burden of proof, and the following testimony was introduced on behalf of the defendant:

W. E. Green's Deposition.

Mr. W. E. GREEN, being first sworn, testified as follows:

Examination by Mr. WOOLDRIDGE:

Q. What is your name?
A. William E. Green.
Q. What is your business?
A. I am General Superintendent of the St. Louis Southwestern Railway Company.
21 Q. Of the entire system?
A. Yes sir.
Q. How much does that system consist of, how many miles?
A. Fourteen hundred and fifty two.
Q. In what States?
A. Illinois, Missouri, Arkansas, Louisiana and Texas.
Q. Is there what is known as the Arkansas and Missouri Division?
A. Yes sir.
Q. What does that embrace?
A. From Texarkana to Illmo and Birds Point and branches.
Q. Your jurisdiction is over the entire system?
A. Yes sir.
Q. How long have you been its General Superintendent?
A. About four years and eight months.
Q. Were you connected with it in any way prior to that time?
A. No sir.
Q. Are you familiar with the condition of the traffic in the fall of 1905, say in October, November, December and January, 1906?
A. Yes sir.
Q. Just tell the jury then what was the condition of the traffic and the condition of the company as to cars, and explain it to them fully?
A. Our total freight car equipment, my recollection is, in exact figures 10,560 cars. About 500 of these are work cars used in the work of ballasting our road and handling of our company material of all kinds. Practically 10,000 are used in commercial service. Commencing I think about the latter part of September 1905 our business was unusually heavy, demands for cars were great, and the demands for equipment on all lines, especially northern lines, was greater than it had ever been. They were unable with the cars that they had at their command to handle their traffic. As a usual thing, the business of the northern lines drops off along the latter
22 part of December or first of January, and we usually don't have very much trouble in getting equipment from them for loading after the first or middle of January, but last year the business did not let up at all until way in the summer of this year. There was a temporary let up in the business the latter part of February or first of March. We got some relief from them in that time. Our usual loading is, in busy season, about 500 or 550 cars a day. Under ordinary conditions it takes a car an average of about 22 days to make a round trip,—that includes the short haul and the long

haul. Under ordinary circumstances one of our cars would be loaded at a point on our line, go to its destination and return to the point where it was loaded in about 22 days. During last winter a great many of our cars were gone three months at a time, over three months. They would get on the eastern lines and by reason of the congestion of traffic and very heavy business they would not move as promptly as they would in ordinary business; the terminal yards were congested. They had to be held out of terminals for want of room in there to handle them, shippers getting more freight than they could handle, and the delays were unusual and unreasonable. With our ordinary traffic and under ordinary conditions our loading would be approximately 550 cars, and 10,000 cars would amply take care of all requirements, but under the conditions under which we labored last fall and winter and under which we are laboring now, it would take twice that number of cars to supply the requirements. Our business begins to get heavy along about the latter part of September, and it usually runs heavy until perhaps the middle or latter part of January, then our cotton movement and cotton seed products is practically over, then again, from the middle or latter part of January until the next October we have a surplus of cars, more cars than we can use standing on our side tracks idle.

Q. What is the condition as to the origin of freight: explain that to the jury,—on the St. Louis Southwestern?

23 A. About seventy per cent. of the freight that originates on the line is destined to points off the line of our road by way of connecting lines.

Q. What effect has that upon cars?

A. It throws our equipment on to connecting lines, and during the dull season, to avoid paying per diem, they will run it back to us, but during the heavy business season, when they need equipment, they will take that equipment and load it in their own service, and they will take it perhaps to a point in New York or a point in California, or a point in Oregon, wherever they see fit to load it. That is a condition that we can't control.

Q. What is the custom among railroads as to delivering cars to connecting lines and handling their cars; what arrangement is there between connecting lines?

A. There is a reciprocity arrangement between lines. The usual custom is to deliver car for car. For instance, we give the Frisco railroad ten cars of lumber loaded in our cars they would give us ten of their empties in return for them. That is the usual custom.

Q. What trouble did the St. Louis Southwestern, in the fall of 1905 and early part of 1906, have, if any, in getting cars from its connecting lines?

A. We simply could not get them. We tried every way possible; we tried to force the transfer of our cars at junction points. We have held cars of lumber and other commodities, non-perishable, in our yards at junction points for thirty days trying to force the connecting lines to furnish cars so that we could transfer the contents at our expense and keep our cars on our line.

Q. What result did you have?

A. We didn't have any results; we had to let our cars go. They

simply said they couldn't furnish them, and we were threatened on one side by the owners of the freight in regard to suits for delays, and the other line was absolutely helpless to furnish us equip-
24 ment to tranfer into, and we simply had to let our cars go.

Q. State whether or not these connecting lines that had the cars of the St. Louis Southwestern would return their own cars?

A. No sir, at that time the Frisco had something like seven of our cars where we had one of theirs.

Q. Did you make any effort to get your cars back from them?

A. Every effort possible. We even went so far as to prohibit the loading of freight for Frisco points on our road.

Q. State to the jury the manner and custom among railway lines in handling each other's cars, and charges, if any?

A. There is a per diem arrangement of 25¢ a day; if we use the equipment of a foreign line we pay that line 25¢ per day up to a period of thirty days; if we keep that car on our line longer than thirty days, we then pay them $1.00 a day, and the same arrangement applies to our cars on foreign lines.

Q. How is that $1.00 a day brought about; state if there is any notice required?

A. It is a penalty to prevent the misuse of equipment, to hurry its return. Now the lines, to avoid that penalty,—we have to give ten days' notice before the penalty applies,—the rule requires that at the expiration of 20 days when cars are on a foreign line, to give that line notice that the car has been there twenty days, and the penalty begins ten days from that notice. To avoid that penalty they will shift that on to another foreign line; it relieves them then of the penalty and the car can remain on that line 20 days.

Q. You mean they load the car and ship it on to another line?

A. Load the car and ship it on another line.

Q. What is the 25 cts. charge?

A. It is a basis of settlement between the lines as to the approximate cost per day of the depreciation of the car and repairs to it.

Q. In a congested state of traffic, or car famine, would the
25 per diem charge rule have anything to do with getting cars?

A. No sir.

Q. Then the 25 cts. is just fixed as a nominal charge, basis of settlement between the companies?

A. Yes sir, the roads would much rather pay the 25 cts. and keep the other fellow's cars than return them.

Q. State what efforts have been made by your company especially and by railroads generally to adopt some plan by which cars could be forced home to the owning company?

A. Well, the matter has been discussed a great deal among the various railroads, as to increasing the per diem; some want to increase it to $1.00 a day and some to 50 cts. a day; a great many of the smaller lines that haven't the large amount of equipment that the larger lines have sorely object to any increase in the per diem, and they have had their way until the 9th of this month at a meeting held in Chicago, the owners of over a million cars voted to increase the per diem to 50 cts. a day to see if they could by that

means force the other lines to return the cars to the lines that they belong to. The 50 cts. per diem goes into effect the 1st of December, and it is the intention if that doesn't do it to increase it to $1.00 or an amount that will do it.

Q. So then, during the season that they are not busy, they would send the cars home to the home company?

A. Yes sir.

Q. Do you know about what per cent. of those cars were on foreign lines during the fall of 1905?

A. It ran from 58% to practically 70% of our cars on foreign lines.

Q. Were you able to get other cars in lieu of those cars?

A. My recollection is that we had an average of 2700 or 2800 foreign cars on our lines, and practically 6000 of our cars off on foreign lines.

26 Q. That you were unable to get home at all?

A. Unable to get home at all.

Q. What effort did you make in the fall of 1905, if any, to get your cars home, or get other cars furnished you by connecting lines?

A. We called upon connecting lines, placed orders with them, urged them in every way possible to return our cars, and in fact we did everything that was possible to get them to furnish us cars, their cars, and get them to return ours, but they would come back invariably with the congested condition of traffic, etc. They were unable to do it.

Q. Who is your superintendent of transportation?

A. A. B. Liggett.

Q. Is he more familiar with the cars?

A. He handles the details of the car department.

Q. What would have been the result as to the company's taking care of the business if you could have gotten your pro rata from the connecting lines, or could have gotten your cars back home?

A. We could have taken care of our business on the line, if we could have kept our equipment on the line, or could have gotten the pro rata of equipment from connections. We could have taken care of the business.

Q. State how the congested traffic of 1905 or the car famine of 1905 and the first of 1906 compared with any other shortage?

A. It was heavier than previous shortages, but not as great as this one this year.

Q. What effort did the company make, if any, to procure additional facilities for the anticipated increase of business for the fall of 1905?

A. We drew up plans and specifications for 2,000 new cars and submitted them—my recollection is that we submitted these specifications along in the month of August, 1905, to different car

27 builders for prices and delivery. The prices quoted for the cars were 16 per cent. higher than we had ever paid for equipment of the same character prior to that time, and there were none of the companies that would agree to furnish any of the equipment under six months. One of the largest car companies in

the United States stated they would not touch the order and agree to make any delivery before the first of 1907; and after negotiating with the car companies for some little time we decided that equipment could not be had in time for the fall business, the prices, etc. were so unreasonable, that we decided to put up our shop and build our own cars.

Q. What about the delivery? Would they agree to deliver them within the time that you needed them?

A. No sir, there wasn't any of them that would make any promises at all of delivery under six months.

Q. What had been the result prior to that time in getting cars?

A. We never had any trouble in getting firms to make delivery in thirty to sixty days. Take such car workers as the Missouri Car & Foundry Co. with their five plants, who turn out about 160 cars a day, and prior to that time they had always been very glad to take the order and turn them out immediately,—we could have started the middle of August and had 2,000 cars in our possession easy by the middle of October, but there wasn't any of them would take the order and make any promise of delivery under six months, and wouldn't make a guarantee of that.

Q. Then taking your observation and experience prior to that time, in what time would you have reasonably expected delivery of the 2,000 cars that you ordered?

A. I would have expected entire delivery within ninety days; I would have expected a large portion of the delivery within sixty days.

Q. What did the company do after it failed to make its contract for additional cars?

28 A. We opened up negotiations and made plans and specifications for new car shops, and we opened up negotiations with contractors, and in February we let a contract for the construction of the new car shop at Pine Bluff, with the necessary facilities to enable us to construct our own cars at the rate of thirty-six a day capacity. We have constructed a steel car shop 125 ft. wide and 684 ft. long, with large blacksmith shop and press room, machinery department, and a large power house, and all other facilities that will enable us to have a capacity of 36 freight cars a day.

Q. Would you meet any ordinary contingency as to traffic?

A. Yes sir. The contract stipulated that that shop would be ready the 1st of September.

Q. Of this year?

A. Yes; he gave us his assurance that he thought he could unquestionably have it ready by the 10th or 15th of August, but he met with a great deal more delays than he had any idea of in getting his steel for the trusses in the shop, and the delay has been now so that he won't get the shop before the 1st of January.

Q. And you anticipate at that time you will begin building your own freight cars?

A. Not later than the 1st of September,—we anticipated when we made the contract to be able to build our own cars not later than the 1st of September.

Q. So now you expect t be able not later than the 1st of January?

A. The 1st of January.

Q. What is the character of that building?

A. It is a steel structure 125 ft. wide by 684 ft. long. There are four tracks in the building that have a capacity of nine cars each for construction purposes, and the shop is modern in every particular, the latest in design of car shop.

Q. Is it a steel building altogether?

29 A. Yes sir, steel and glass.

Q. About what is the company expending?

A. About $325,000.

Q. How was the business or traffic in 1905? How did it compare with 1904?

A. We had an increase of about 12 per cent.

Q. If you had gotten these 2,000 cars that you endeavored to get, could you reasonably have taken care of the traffic, notwithstanding you could not get your cars back?

A. No sir, it wouldn't have taken care of the traffic that we had. You understand that it would have more than taken care of any traffic that we had, but in the manner in which the other lines kept our cars, why the 2,000 additional cars would not have supplied our industries.

Q. Was it possible at all for the St. Louis Southwestern Railway Co. to have gotten its equipment from these connecting lines?

A. No sir.

Q. Was it possible for you to get the pro rata as was the custom from these connecting lines?

A. No sir, they didn't have them to give; they were in just the shape that we were in; they had more business offered than they could possibly handle.

Q. What particular product caused that increased traffic in the east and north?

A. The grain movement was one of the principal products, and the coal movement.

Q. How did that compare with previous years?

A. It was much heavier.

Q. What is the principal tonnage handled by the St. Louis Southwestern?

A. Lumber is our principal product.

Q. What else?

30 A. Cotton and cotton seed products, merchandise, coal, hay.

Q. Do you know how many cars the St. Louis Southwestern has to the mile?

A. They have practically ten cars to the mile,—no, nearly nine cars to the mile.

Q. Eight and a fraction?

A. Yes sir.

Q. How does that compare with other trunk lines in the United States?

A. It is away ahead of them. Some of the coal carrying roads who have an extremely heavy coal business, adding in their coal equipment runs them ahead of us,—the Penna. Co. does; we have more box cars per mile than any other road in the United States; our equipment will run to the mile about third to any of the western lines running west and south of Chicago; I think we stand third.

Q. In the percentage of cars to the mile?

A. Yes sir.

Q. How are the cars supplied to shippers in the event the company is not able to furnish all the cars ordered? What are your instructions to your subordinates?

A. My instructions to subordinate officers are that the equipment must be pro rated among the different shippers according to the amount of business that they have to offer.

Q. Are you advised that that is a requirement of the Interstate Commerce Law?

A. Yes sir.

Q. In Arkansas, how are they required to be furnished in the event you cannot furnish all.

A. You mean by the commission rules?

Q. Yes sir.

A. Under a pro rata or percentage according to the business offered.

Q. Does the company, so far as you know, make what is
31 termed an equitable distribution of cars to the shippers, if they are not able to furnish all? Do you know whether an equitable distribution of cars is made to shippers in case of a car shortage?

A. I know as far as it is practicable to know.

Q. Mr. Green, what would be the effect as to Interstate shippers, in the case of a car shortage or congested traffic, if the company was required to obey the order of the Railroad Commission in furnishing all of the cars ordered for State shipments by shippers?

A. Under the present stringency they would get a very small per cent of the cars that they wanted to load.

Q. State whether or not the furnishing of all the cars ordered by State shippers, as required by the Railroad Commission, would work a discrimination against interstate shippers?

A. It certainly would.

Q. Do you know what per cent of the business of the St. Louis Southwestern is Interstate?

A. It varies; it runs from 70 to 75 per cent; from 25 to 30 per cent State.

Q. Take the conditions that confronted the company the fall of 1905 and the month of January 1906, what would have been the result as to shippers ordering cars for interstate shipments, if the company had supplied all cars ordered for State shipments?

A. Well, our average daily loading along that period would be about 125 cars for State shipments and about 375 for interstate shipments; my recollection is we were furnishing about 60 per cent of the requirements of both.

Q. You have reference to 1905

A. That is what I am speaking of, about sixty per cent. Now if we were to be required to furnish the entire quota of 125 cars for local or State business, everything above their proper quota or equitable division would have to be subtracted from the re-

32 quirements of the interstate movement, or in round numbers about sixty cars a day would have to be taken away from interstate shipments and applied to State shipments.

Q. Then that would necessarily work a discrimination against interstate shippers?

A. Yes sir.

Q. Would the filling of these orders for State shipments cause you to decrease the number of cars furnished interstate shippers?

A. Yes sir, it positively would. We gain our revenue from no other source than by moving traffic, and it is a greater hardship on our company to lose this traffic by reason of our failure to be able to furnish the cars than it is on the shipper, I think, by failing to get his cars.

Q. Then the company would be anxious to furnish all the cars ordered?

A. Every car ordered if it was possible for us to do it.

Q. It would affect its revenue would it to do that?

A. Yes sir.

Q. So then the effort of the company would be to furnish all the cars that might be ordered?

A. Every car that it is possible for it to furnish.

Cross-examination by Mr. CLYDE PETTIT:

Q. Mr. Green, what is the principal product shipped from Stuttgart?

A. Hay.

Q. And the next principal product?

A. Well they ship manufactured lumber from there; I think hay and cattle and manufactured lumber are practically the products that are shipped from Stuttgart.

Q. You are familiar with the shipments from Stuttgart and the character of freight?

A. Quite familiar yes sir.

33 Q. How many cars were used in Stuttgart this year? How many were shipped from Stuttgart this year?

A. You mean in the year 1905?

Q. Along say in the fall of 1905 and the spring of 1906; I mean in the months of October, November, December and January,—do you know?

A. I can't tell you without looking it up, but from my memory—I wouldn't say for certain,—somewhere about fourteen or fifteen hundred cars.

Q. You call a season commencing with the fall and ending with January or February?

A. No, we call a season a year,—but a season for some particular crop that moves in four or five months, we call that a season.

Q. The season of congestion you say extends from the first of September until January or February?

A. Yes sir.

Q. Do you know how many cars were shipped from Stuttgart during the congested season in 1904-05?

A. No, I haven't the record with me; we keep it every day but I don't keep it in my head.

Q. Do you know how many cars were shipped from Stuttgart during that season in 1903-04?

A. No, I couldn't give it to you off hand.

Q. Do you know during that season in 1902-03?

A. No.

Q. 1901-02?

A. No, you understand I am saying no, because I can't give you the figures here; the figures, I didn't familiarize myself with them—they are here.

Q. Do you know how much hay was shipped out of Stuttgart during that season in 1902-03?

34 A. No sir, I don't keep up with the details.

Q. 1901-02?

A. No sir..

Q. 1903-04?

A. No sir.

Q. 1904-05?

A. No sir.

Q. Nor this year?

A. No sir. .

Q. Do you know how much hay is produced in the vicinity of Stuttgart, which in the ordinary course of business is shipped out of Stuttgart?

A. No, I couldn't tell; I would say somewhere about 2,000 cars.

Q. Do you know how much hay was produced there in 1901?

A. No.

Q. Or 1902, or any year to this date?

A. No, not the exact tonnage; approximately, yes.

Q. How much was produced in 1901?

A. I wasn't there in 1901.

Q. In 1902 approximately?

A. I should say twenty or twenty-five hundred cars.

Q. 1903?

A. I should say about the same.

Q. In 1904.

A. I don't give detail knowledge of it; I know in a general way what it is but I don't keep the details of it.

Q. You don't know of your own knowledge anything about those facts?

A. Not that particular thing, not the detail of it.

Q. You don't know of your own knowledge about the amount of hay produced there during those years?

A. Approximately.

35 Q. Of your own knowledge?

A. I know what is shipped from there, at least I have an approximate idea of it, but as to what amount is raised in there ——

Q. If you have an approximate idea, how much was shipped there during the year 1902?

A. I should say in the neighborhood of 1500 cars of hay was shipped in 1902.

Q. And in 1903?

A. Not very much difference.

Q. And in 1904?

A. I think the hay shipments run from 1500 to 2000 cars a year right along.

Q. How many cars do you say were shipped from there during 1905?

A. I can only approximate it, but I should say somewhere about 2,000 cars.

Q. How many cars were shipped do you say from Sept. 1st, 1905, to the middle of January, 1906, during that time?

A. I can't give you the exact cars; they didn't ship what they could have shipped if they had had the cars to ship it with, but I don't know how many they did ship.

Q. Do you know approximately how many they shipped?

A. I think we filled about sixty per cent. of their requirements.

Q. Do you have any idea how many cars you shipped during that same period of the year preceding?

A. No I do not.

Q. What do you know about the shortage at Stuttgart that has occurred for several years? Do you know if there has occurred any?

A. Yes sir.

Q. There was a shortage there in the fall of 1904 I believe you stated?

36 A. Yes sir.

Q. And also in 1903?

A. Yes sir, I think there has been a shortage there every hay season.

Q. And in 1902?

A. Yes sir, I think—my recollection is there has been a shortage there in every hay season.

Q. Do you know whether there was more hay produced in the locality in 1905 than in 1904 or less?

A. No I don't attempt to say.

Q. You don't know whether there was more hay shipped in the fall of 1905 than in the fall of 1904 or not then?

A. No.

Q. Now Mr. Green, you stated that if you had furnished all the cars for State shipments that were necessary that would have prevented you from furnishing cars for interstate shipments?

A. Yes sir.

Q. Would that be true if you had had enough cars for both purposes?

A. We had plenty of cars for both purposes if we could have gotten them returned to us.

Q. But if you had enough cars subject to your command to have served the public demands that required transportation, for serving the demands of the public for State shipments as well as interstate shipments?

A. If the State shipments moved on the line of our railroad under our own control, and the interstate shipments moved on the line of our railroad under our own control, we would have had ample equipment.

Q. If you had had sufficient cars subject to your command to have supplied the demands of shippers for both local and foreign shipments, could you not have furnished all the cars that
37 were required without discrimination?

A. Why certainly we could.

Q. Then the reason for your inability to furnish cars without discrimination was your shortage of cars, that is the shortage of cars which you could not get?

A. Yes sir.

Q. You stated I believe that it was not possible when a car got off of your road to get it back. Doesn't the same law apply to railroads as to anyone else, the law as to recovering property held by others?

A. I have never taken legal advice on that question. I can't answer it.

Q. In other words, if the Cotton Belt railroad has a car up here in Chicago, you don't know whether you can get the car back or not do you?

A. No sir.

Q. You don't know of any way to get that car back?

A. No sir, except in the usual manner.

Q. If they should refuse to send the car back you never could get it could you?

A. If they would positively refuse to send it back.

Q. Would you require them to send it back?

A. We would require them to send it back if there was any law to do it.

Q. If they just won't bring it back you wouldn't require them to bring it back?

A. We never have sued any of our connections for the return of equipment. By the time the suit would be decided perhaps the necessity for the car would have passed.

Q. You don't know of any remedy to get the immediate delivery of personal property?

A. None that I know of: we exhausted every remedy that we had.

38 Q. You state then as a matter of fact that there is no means in law by which you could get back your cars?

A. No sir, I didn't state any such thing.

Q. Did you state that there was any way?

A. That's a matter that I don't mean to state anything on.

Q. Didn't you state in your direct examination that it wasn't possible to get those cars back?

A. Not possible by any of the methods of the handling of equipment between connecting lines.

Q. Then it is not correct to stop at the word possible—it is not possible, with the provisio that it is not possible under the arrangement with the companies, without taking direct action?

A. Yes sir.

Q. But it would be possible if you had some other means of action?

A. It might be.

Q. Was there any reason why you shouldn't require these companies to send the cars back?

A. During the period of the operation of American railroads there is no case where one railroad has ever sued another for the return of its equipment. These matters we have always been able to handle and adjust amicably between ourselves without resorting to the courts.

Q. Don't you consider the railroad companies were doing you wrong in failing to send the cars back?

A. Yes, but I realized it was a wrong that they couldn't control. Our traffic is destined to all points of the compass; it originates on our lines and goes to New York, Philadelphia, Oregon, Washington, California and all over the country, putting our equipment on other lines loaded with traffic, and a great deal of it is stuff that cannot be transferred without damaging it. I realize that the roads were doing all that they could under the circumstances and con-
39 ditions and didn't consider that I would be treating them fairly if I undertook to enter suit to force them to return our cars to us.

Q. If you had found a train load of your cars on a track in Chicago and had tendered that company the freight necessary to get these cars to you, couldn't you have gotten them back?

A. It wouldn't have been necessary—to bring them back.

Q. Would they have brought them back without freight?

A. Yes, would in that case if they had the engines and equipment to move them with; we don't have to tender freight.

Q. Then it was possible for you to get a car back at any time that you located the car and demanded its immediate return?

A. No I didn't say that.

Q. You have shipments from over the country to your line just the same as you ship to their lines?

A. Yes sir.

Q. When you get a car from another company and demand its return, do you send it back?

A. Send it back at the first loading we were offered.

Q.. If they were to offer to pay the freight?

A. If they offered to pay the freight we would send it back.

Q. If another company had your car?

A. We wouldn't be justly entitled to pay the freight; they took the car from us and it is their duty to return it to the same junction

that they got it from; it is part of their obligation to return that car to the junction point they get it from.

Q. I believe you stated that the recent regulation of the companies is to the effect that the per diem charge be changed?

A. Yes sir.

Q. And that the intention is to require the companies to return the cars immediately?

A. Yes sir.

A. And if that doesn't accomplish the purpose they will charge more?

40 A. Yes sir.

Q. And these regulations are to require the return of cars?

A. Yes sir.

Q. If these regulations had been made two or three years ago don't you think the cars would have been returned?

A. It has only been in the last two or three years that we had the extreme business on all the roads that we have the past two years. The per diem I think was put into effect about two years ago. Before they put that into effect cars were handled on a mileage system. You paid for the amount of miles that the car traveled over your road. That system wasn't satisfactory and they discussed the matter and decided on the per diem system. Now the per diem system was first based on a per diem of 20 cts. a day. They found that wasn't enough; they increased that to 25 cts. and thought perhaps that would bring them back, and found that wouldn't do it and have increased it to 50 cts., the object being to increase the per diem to such an extent that would force the short lines that don't have its pro rata of equipment to buy its pro rata of equipment so that all the lines would be on comparatively an equal basis so far as equipment is concerned, and it wouldn't be necessary for these lines to pirate on the larger lines that have the large amount of equipment.

Q. You referred a moment ago to the penalty which accrues on the 30th day that the car is out, after you have given ten days' notice, what is that penalty?

A. $1.00 a day.

Q. And prior to that time it is 50 cts. a day?

A. Prior to that time now it is 25 cts. a day. December 1st it will be increased to 50 cts. a day.

Q. I believe you stated that the 10,560 cars which you have is more than you need during all the months except the fall season?

A. Yes sir.

Q. If that be true, what is the use of constructing a factory

41 to build 36 more cars a day?

A. To have equipment enough to take care of our business at any stage of the year. There are about four or five months in the South that all of your business moves together; lumber shipments are heaviest; the cotton comes in at that time; your hay, and all of your tonnage is offered in four or five months.

Q. When you get your factory constructed and construct 36 cars a day and let the cars go out on the other roads like you have done, you still wouldn't have enough left?

A. Yes, I think they will; I think at 50 cts. a day the roads won't be as anxious to keep cars as they were; at 50 cts. a day I think the roads can afford to build their cars, the smaller roads that are short of equipment can afford to build cars rather than pay 50 cts. a day, and I think we will get more cars returned than we have in the past. We have had to send away in the last 18 months nearly 2000 cars to be rebuilt.

Q. You have the power to require of a company keeping one of your cars to pay $1.00 a day?

A. After it has been there thirty days.

Q. Wouldn't you have the power to require them to pay you $2.00 a day?

A. No sir.

Q. It is your property isn't it?

A. We could make them pay $10.00 if we wanted to.

Q. Or twenty?

A. Yes sir.

Q. If they had to pay you $20 a day for your cars wouldn't they buy?

A. Yes, but by doing that we would have the hand of every railroad company against us.

Q. In other words, you are buying the good will of the other companies by letting them use your cars?

42 A. Not necessarily.

Q. Who is paying for the good will of the railroad companies under that arrangement, the shippers or your company?

A. I think the railroad company is paying for that good will if anyone is paying for it.

By Mr. EDWIN PETTIT:

Q. Mr. Green you stated in your direct examination that the company made effort to ship the freight, that is the way you make your money, by carrying freight. I correctly understood you?

A. Yes sir.

Q. You stated if you didn't ship it you lost the traffic. Please explain to the jury how you lose the shipment of the Stuttgart hay if you don't carry it the day the cars are demanded?

A. I didn't have reference particularly to the Stuttgart hay; I had the lumber business in mind.

Q. That of course is true with reference to points where there are competing lines of road, or where there are no rivers to carry it out, but it is not true of points like Stuttgart where they have no other way of getting rid of their produce except over that line?

A. It is true of places like Stuttgart. For instance, I don't think there is a day passes that I don't get complaint from mill men that orders for lumber at their mills have been cancelled and placed at some other mill on some other line because we can't furnish equipment. We consider that tonnage lost to our line.

Q. How can farmers and hay dealers around Stuttgart get their hay to market until you get ready to carry it, provided they have got more than they can use at home?

Q. It would be rather impracticable for them to get their hay out until we could furnish equipment.

Q. That would be a little more impossible than for you to get your cars back?

43 A. Yes sir, it would be impracticable.

Q. Were you not before the Railroad Commission in Stuttgart in February, 1903, in regard to car shortage at Stuttgart?

A. Yes sir.

Q. Did you not know at that time that they had suffered considerable for want of cars?

A. Yes sir, we bought two thousand cars right after that.

Q. If you had placed your orders at that time or shortly after that time, instead of waiting until August 1905, couldn't you have had cars?

A. We did buy 2000 cars immediately after that, and thought that was plenty.

Q. Is it not true that at that time you could get the cars by signifying your willingness, and let them take the proceeds, without your putting up a dollar for the cars at that time?

A. No sir.

Q. That wasn't the rule at that time?

A. No sir.

Q. Does the law of Arkansas in regard to the furnishing of cars equitably to the different patrons of your road have any influence on your actions in Texas?

A. No sir.

Q. Does the law of Texas, requiring you to pay demurrage if you don't furnish cars in a certain number of days?

(Question objected to.)

A. We don't have any laws of that kind.

Q. You had a law of that kind but you carried it to the Supreme Court?

A. We never had one.

Q. The law of Texas is somewhat similar to the law in Arkansas?

A. Yes.

Q. You are not as familiar with the laws of Texas and

44 Arkansas as you are with the Interstate Commerce law?

A. Yes sir, I think I am.

Q. Did you say that under the laws of those different States, Missouri, Arkansas, Texas, Louisiana and Illinois, you have got to furnish the same amount of cars to each State, or to the citizens of each State, or your patrons of each State?

A. I said as a matter of equity we do, yes sir.

Q. Because of the law?

A. No sir.

Q. Do you say there is the same shortage of cars in the States of Missouri and Texas that there is here in Arkansas?

A. Yes sir.

Q. And the same complaint about it?

A. Yes sir.

Q. All along your line?

A. Yes sir.

Q. And still you haven't provided but 2,000 cars since 1903?

A. We have got plenty of cars now to take our maximum loading.

Q. If you had sixty more cars a day through the whole year in the State of Arkansas, could you do all the business in Arkansas?

A. No sir.

Q. You said awhile ago if you would take 60 cars a day off of the Interstate shipments you could provide for all the business of Arkansas?

A. No sir, I said the Arkansas loading was 125 a day, and that the Interstate loading was 375. Now we are furnishing about fifty per cent. of our daily requirements and in 1905 we were furnishing sixty per cent., and it would take about sixty cars a day off of interstate requirements to comply with State requirements if you had to furnish every car.

Q. If you had sixty cars more to handle the State business each day in the year you could handle it without any shortage or
45 famine according to your statement?

A. I think we have covered that point pretty thoroughly.

Q. I just want to know if I understand you right?

A. About 2,000.

Q. 60x365 would be about 2,000 cars? If you had then 2,000 more cars and used those 2,000 for the accommodation of your patrons in the State of Arkansas, there would be no car famine nor car shortage?

A. If we could get our connections to return our cars to us there wouldn't be any shortage; if we had our equipment of 10,000 freight cars at our disposal all the time, there would be no such thing as a shortage of equipment on the line of the Cotton Belt road in Arkansas.

Q. If you had 2,000 more than you have got and used them in this State there would be no shortage?

A. If the roads returned our cars to us on the same percentage that they do now.

Q. Is there any complaint of Arkansas roads not returning your cars when you ship to Arkansas?

A. Yes sir.

Q. So in addition to the 6,000 that the Cotton Belt has outside of Arkansas and in other States you have got a lot in Arkansas?

A. Yes sir.

Q. Out of 10,000, how many do you use in your Arkansas traffic?

A. The Arkansas traffic under ordinary conditions about 3,000 cars would take care of the Arkansas traffic.

Q. And yet you claim there has been a congestion for every year since 1902 and a shortage, and that your patrons in Arkansas have suffered for the lack of that number of cars for their use?

A. Understand we have bought since 1901 5,000 freight cars. We have every year, realizing that shortage, added to our equipment 1500 or 2000 cars. Since 1901 we have built 5,000 freight cars.

46 Q. That doesn't average 2,000 a year?

A. I stated if we could get our connections to return our cars to us we would have no shortage.

Q. What per cent. is 3,000 of the whole number?

A. About thirty per cent.

Q. Then if 70 or 75 per cent is off of your line in the Interstate trade and thirty percent. is what you have got in Arkansas on your own lines and in the hands of other railroads in the State, now what per cent. are you using on your own lines?

A. I stated from 58% to 70% of our equipment was off of our lines on other railroads, state and interstate.

Q. You have really thirty per cent of the equipment for the use of the Arkansas traffic?

A. Yes, and we have on our line about thirty per cent. of our equipment in foreign cars, so that we have, counting foreign cars and our own, about sixty per cent. of our total equipment.

Q. How is the famine of 1905 compared with the famine of 1901?

A. What is the difference in the car shortage for 1905?

Q. And 1904?

A. I can't tell you off-hand.

Q. How would it compare, 1905 with 1906?

A. We are more short now than we have ever been.

Q. You say that the country is building up fast and that crops are increasing, and with that the famine increases; that seems to indicate that the road is at a stand still and everything else is moving forward?

A. No sir, I told you we had built 5,000 new cars in the last five years.

Q. That indicates that everything else is moving forward faster than the road?

A. No, our business has been increased on an average about
47 eight per cent. per annum, and our equipment has been increased about ten per cent. per annum.

Q. Haven't there been famines at any other season except the fall season?

A. Not for more than three or four days at a time.

Q. Don't the mill men have continual trouble about getting cars to load their timber?

A. No sir.

Q. Don't have any trouble only in the fall?

A. Fall and winter. Sometimes they are for some particular class of car.

Q. Don't the grain men have famine when you want to ship ties?

A. No, in the Summer season they don't.

Q. Not in July and August?

A. No sir.

Q. Always have plenty of cars during that season?

A. Yes sir.

Q. The famine just lasts September to January?

A. Sometimes it runs into February.

Q. You say the company doesn't give all its cars to the State of Texas under that law?

A. No sir.

Q. You say that the shortage of cars is in the same proportion to the business there it is here?

A. Yes sir.

Q. You say if the railroad company don't furnish a car it doesn't have to pay $1.00 a day for every day it neglects to do so?

A. No sir.

Q. Even for State shipments?

A. No sir.

Q. If a man orders a car and the railroad don't furnish it the railroad don't have to pay?

48 A. No sir. They have a law there where the penalty applies, where the shipper has the privilege of tendering 25% of the freight charges for the car, if it isn't furnished within five days he is entitled to a penalty.

Q. Whenever a man does that you furnish the car don't you?

A. We do if we can.

Q. Have you had many penalties to pay under that state of facts?

A. Never had one to pay; I don't think we have had more than two or three served on us.

Q. I will ask you if hay is a profitable and desirable product for railroads to carry as compared with other products?

A. Well there are other products that pay more revenue than hay.

Q. As a matter of fact isn't hay a product which railroad companies notoriously avoid and dislike as a product?

A. Why no.

Q. That is not correct?

A. No.

Q. Isn't it a fact that in the construction of a railroad the amount of hay which a territory will produce is the last consideration?

A. Yes sir, if I was going to construct a railroad through a territory that didn't furnish anything but hay, I wouldn't build it; there are other products that are less desirable than hay but hay is not desirable.

Q. It is a bulky product on which the company does not receive as much revenue as other products more desirable and less bulky?

A. Yes sir.

Q. I will ask you if it isn't perishable if not shipped at certain seasons of the year?

A. Unless it is properly stored.

49 Q. I will ask you about the condition of the hay market, if hay must not be transported to its destination before January, before the market breaks?

A. Not necessarily; there are exceptions.

Q. I know there are exceptions, but hay men tell me—Do you know about the hay market?

A. No sir.

Q. You don't know whether it goes up in the summer time or down?

A. I don't know anything about it except what hay men tell me.

Q. During the cotton moving season don't you stand off the hay until you get the cotton all moved?

A. No sir; I think if you will go along the line of our road you will find every cotton platform on it piled with cotton, and you will find in Texas where we have leased ground outside of the right of way to store cotton.

Redirect examination by Mr. WOOLDRIDGE:

Q. Counsel for plaintiff asked you if you couldn't recover your cars by litigation. Are the cars that are sent out by the company not scattered all over the United States?

A. Yes sir.

Q. Would it be possible to go around and hunt up these cars and replevy them from the companies?

A. No sir.

Q. Could one railroad company that would limit its rules in allowing its cars to go off its lines do business with the country?

A. No sir.

Q. Would it be possible for a railway company to do business in that way?

A. No sir.

Q. Do you have any trouble in getting your cars back and your pro rata from connecting companies after the congested traffic is over?

50 A. No sir, don't have any trouble in getting them back or getting other cars on our lines.

Q. When the traffic is not heavy are they not anxious to furnish you their cars and get them loaded in order to get revenue themselves?

A. Yes sir.

Q. And these companies that have not provided themselves with proper equipment, in a car famine do they not prefer to keep the cars and pay the penalty rather than send them home?

A. Yes sir.

Q. What would be the result if all of these companies had about an equal amount of equipment; for instance, these short lines that have a low percentage of cars, suppose they were all about equal with the Cotton Belt what would be the result?

A. There wouldn't be any such thing as a car famine if all the lines throughout the United States had as many cars per mile of road as we have, or as many cars as per the tonnage and the average haul that the tonnage moves as we have, there would be no such thing as a car shortage.

Q. When you speak of the percentage of cars that you have you have reference to the entire system?

A. Yes sir.

Q. State whether or not the percentage of the shortage of cars throughout last fall and at the present time in Texas was the same as in Arkansas?

A. The same. The same in Missouri. The same in Illinois.
Q. There is no preference given in any State over another?
A. No, sir.
Q. It is the object to treat all shippers alike?
A. As near as we can.
Q. If your line had double the equipment that it has now, what would be the effect in case of a car famine and your cars got off on those other lines?
51 A. We would be practically in the same shape we are now in exactly. In other words, the last two or three years we have been building cars for other railroads.

Recross-examination by Mr. CLYDE PETTIT:

Q. When you let a car of yours go off of your road to some other point, you have a record of where the car goes do you not?
A. Yes sir, that record,—I will say for instance a car goes off of our road to the Illinois Central at Cairo. When that car reaches Cairo they send us a junction card; they pass it on to the Big Four and the Big Four will send us a junction card; it may go clear to New York or the New England States; we have a record following behind the car, say from four days to two weeks behind the car.
Q. I believe you stated that you didn't know of your own knowledge how many cars were shipped from Stuttgart during the years 1904, 1905 or 1903?
A. No.

By the COURT:

Q. How long have you had this arrangement with other companies as to the exchange of cars?
A. I have been in the railroad business 38 years and it was in existence when I went into the railroad business.
Q. I mean this railroad?
A. It is a common custom among railroads and has been ever since traffic was interchanged between various lines.
Q. They have had about the same arrangement then ever since you have been with them?
A. Yes sir.
Q. Do you say if you had all of your cars all the time you would be able to take care of your freight at any season of the year?
52 A. Yes sir, at any season of the year.
Q. Then the failure, as I understand it, to furnish cars as demanded by the plaintiff, or by Mr. Reinsch and others at Stuttgart, was because of these companies' failure to return cars when they should have done it under this arrangement?
A. Yes sir, under this arrangement.

By DEFENDANT'S COUNSEL:

Q. Or to supply you with other cars?
A. Yes sir; you understand that the arrangement between the various lines is an old arrangement that has been in existence ever since I have been in the railroad business, for the interchange of

business. We handle a great amount of freight that cannot be transferred,—you take dressed lumber,—in transferring that you damage it to a certain extent, a character of freight that cannot be transferred. The lines have agreed to permit their cars to go to destination with the understanding that the other lines would give them an empty car for every loaded car, making an equal and equitable distribution of the equipment, or exchange rather, at junction points.

Q. If these connecting roads had kept their part of the agreement you could have supplied the demands of your line at all seasons of the year?

A. Yes sir.

Q. And could have supplied the cars asked for by Reinsch and others at Stuttgart?

A. Yes sir, could have supplied them.

Q. I believe you said you couldn't state of your own knowledge whether there was any unusual amount of hay produced in the fall of 1905?

A. No sir.

Q. Nor if there was any unusual number of tons shipped
53 out of there in 1905?

A. No sir.

Q. This per diem charge that you refer to is just a mere custom of the railroad companies?

A. Yes sir.

Q. The failure of these connecting lines to keep their part of the agreement,—how long have they failed to do that?

A. Well they failed this year commencing I think along about the latter part of August, middle or latter part of August, holding back our cars; I think they had something like 1,000 balance against us about the middle of August, and that has been increasing all the time; for the past three or four years they have been doing that more or less. It is more acute this year than previously.

Q. Car shortages in this fall and winter and in 1904 were due to the same reason I suppose?

A. Yes sir.

Q. And 1903 the same reason?

A. Yes sir.

Q. And 1902 for the same reason?

A. Yes sir.

Q. Those lines have been treating you that way those years?

A. Yes sir.

54 *E. A. Peck's Deposition.*

Mr. E. A. PECK, being first duly sworn, testified:

Examination by Mr. WOOLDRIDGE:

Q. Mr. Peck, what business are you engaged in?

A. Superintendent, St. Louis Southwestern Railway Co.

Q. Division superintendent?

A. Yes sir.

Q. Over what part of the line does your jurisdiction extend?
A. Between Illmo or Thebes and Texarkana, including branches.
Q. Arkansas is in your jurisdiction?
A. Yes sir.
Q. State whether or not you have to do with the distribution of cars to shippers?
A. I have supervision over the distribution of cars.
Q. Do you have what the railroad company call a car shortage or car famine?
A. Yes sir.
Q. How are cars furnished to shippers in a case of that kind?
A. They are furnished pro rata; we try to make an equitable distribution of all cars if there is a shortage.
Q. Is the pro rata made in number or in proportion to the output of a mill or the product of a man?
A. In proportion to the output.
Q. Then you endeavor to make a distribution in accordance with the business a concern or person is doing?
A. Yes sir.
Q. That is, you take into consideration the amount of his output?
A. Yes sir.
Q. State whether or not there was a car shortage in the fall of 1905 on the St. Louis Southwestern Railway?
A. Yes sir.
55 Q. Did that extend over the country generally?
A. Yes sir.
Q. How were the cars distributed to the shippers at Stuttgart in the months of October, November and December 1905 and January 1906, as compared with other shippers along the line?
A. We made an equitable distribution of the cars between all stations.
Q. How is this distribution made at the point of shipment, through whom?
A. We deliver the cars to the point and the agent makes the sub-distribution.
Q. Is he instructed by you how to make them?
A. All agents are instructed in a general way.
Q. Is that their instructions in case of a car shortage?
A. To make no discrimination, make an equitable distribution.
Q. Then the agent at Stuttgart would know under his instructions how to make the distribution in case you were not able to furnish all cars ordered?
A. Yes sir.
Q. Was there any discrimination at that time or since that time or prior at Stuttgart as compared with other points?
A. No sir.
Q. Do you make any discrimination as to the product a man ships?
A. If we had live stock we would have to furnish cars for it.
Q. Do you give a man that doesn't handle hay any preference over a man that does?

A. No sir.

Q. Then you undertake to treat all shippers alike, except in perishable property, in case of car shortage?

A. Yes sir.

Q. Was the company able to furnish all the cars to fill the orders in the fall of 1905?

A. No sir.

56 Q. Do you know about what the shortage was, about what per cent you were able to furnish?

A. We were approximately short, during the months of October, November and December, about 650 cars a day.

Q. Over your division?

A. Yes sir.

Q. You don't know what per centage you were able to furnish on the orders?

A. Approximately at that time 55 or 60 per cent.

Q. You mean by 650 that your orders exceeded the orders that you were able to furnish?

A. Yes sir.

Q. What is the season of the year that the heaviest traffic is done over your road or tendered to your road?

A. October, November and December.

Q. What was the result prior to the car shortage of 1905-1906 as to when the demand for cars would let up, or you could get cars?

A. The heaviest business is in the three months that I referred to, October, November and December; generally about the first of January the business ceases to be quite so heavy. It begins to fall off from the first of January.

Q. How was this shortage as to 1905-1906? Did it extend longer than it had before?

A. The car shortage in 1905 and 1906 has been worse than it was prior to that.

Q. Wasn't that the worst that the road has ever experienced?

A. Yes, sir, since I have been with them.

Cross-examination by Mr. EDWIN PETTIT:

Q. In reply to question on direct examination, you stated that you estimated the number of cars to be sent to each point, and the depot man divided them around among the business men of

57 the point, you didn't send them direct to the business men?

A. We send them direct to the station.

Q. How do you arrive at the number of cars that should be sent to each station?

A. From our records. How do we arrive at the proper number to send to each station?

Q. Yes.

A. By taking the business that is done at the stations as a basis.

Q. Then you have got to be sort of a judge of the different points and decide what business is done, and arrive at the proper amount of cars to be sent there? That is your business?

A. Our agents put in requisitions for cars at the stations, the total number of cars required.

Q. And then you send out the number that he asks for?

A. No, sir; I haven't made any such statement; I said that we were short of cars.

Q. How do you arrive at the number to send out?

A. From our reports; we keep a record of our business.

Q. Then you send him you say about sixty per cent. of what he asks for?

A. I said we furnished about fifty-five or sixty per cent approximately.

Q. How does he arrive at how to divide these cars out in his locality?

A. From the requisitions that he receives.

Q. He is instructed to give out about sixty per cent.; if a man would demand ten cars he would be authorized to give him six?

A. If a man placed an order for cars the agent would subdistribute from his requisitions.

Q. You said in your direct examination that there was no discrimination. How do you know that your agents along the
58 line did no- discriminate against the different business men?

A. I call upon the agents for their requisitions and go over them.

Q. And that is the way you know that he don't discriminate at all?

A. Yes sir.

Q. You say you were 650 cars a day short during the congested season, October, November and December 1905, and January 1906? How many cars did you use a day during those months?

A. Our movement, if we could furnish all the cars that were wanted, would be about 1200 or 1400 a day, our total movement.

Q. That would really mean that you just about have half enough cars to do the business during those months. What shortage, if any, did you have in 1904, during these same months?

A. I should say we had about 25% or 30%.

Q. In 1903 was there any shortage in these months?

A. Yes sir, there was a shortage in these months, probably about 25%.

Q. Was there any shortage in 1902?

A. I couldn't state definitely as to that because I haven't looked it up recently.

Q. You recollect they had the railroad commission at our town in February 1903 in regard to this car shortage business?

A. They may have been there; I don't recollect whether they were or not.

Q. Hasn't the shortage been sort of a chronic affair; it happens every year; it happened in 1903, 1904 and 1905, and worse than ever in 1906; that is your testimony I believe,—it happens every year?

A. We have had some shortage during these busy months since

1902, but it has been worse in 1905 and 1906 than it was before that.

59 Q. Didn't you ever have a shortage during any other months except these four months designated?

A. Not a general shortage; there may be some special classes of cars we would be short on.

Q. How many cars would it require added to the present equipment to give you ample facilities for handling the traffic without a famine every year?

A. That would depend wholly on what our connections would do in reference to returning equipment.

Q. Suppose they did as they have been doing since 1903, suppose the return was the same as it has been?

A. It would be rather hard for me to estimate that.

Q. About how many cars have you got on the system?

A. We have eight cars to the mile.

Q. About how many would it take to the mile do you think to accommodate the public and the patrons of your road?

A. I don't know that I could approximate that for the reason that business varies different years.

Q. You say I believe that you treat your local customers and your interstate traffic on the same basis, on an equitable basis?

A. Yes sir.

Q. Isn't it a fact that the interstate traffic gets the largest proportion of your cars?

A. Interstate traffic is very much heavier than the State traffic.

Q. How much heavier?

A. In percentage it runs about 70 to 30.

Q. 70 for interstate and 30 for State?

A. Yes sir.

Q. In your interstate traffic, isn't that carried on largely by foreign cars that are shipped in here full of merchandise and household goods and other commodities, that are loaded with

60 our commodities and carried out on the return?

A. No sir.

Q. Isn't it a fact that frequently we can get cars to ship anything we want to to other States, when we can't get them at all to ship to points in Arkansas?

A. No sir, it is not a fact.

Q. That is not a fact at Stuttgart?

A. It is not a fact generally.

Q. I want it locally now,—isn't it a fact at Stuttgart that we can ship things outside of the State when we can't ship them to any point in the State?

A. No sir.

Q. Isn't it a rule of your road that any car that comes in from a foreign State can be loaded with produce to go back to the same direction?

A. It is a rule that it can be loaded back to the connection that we receive it.

Q. So you let the man that ships the goods in ship it out again?

A. We let the agent at the station distribute.
Q. It is not the rule that the fellow that ships it in ships it out?
A. That is not the rule.
Q. Isn't that your custom?
A. The agent at the station has the distribution.
Q. Isn't it a fact that the man who ships goods in from outside the State would better be able to ship out?
A. There is no discrimination made in the distribution of equipment at the station.
Q. And you are not able to say just about how many cars would be required to accommodate the patrons of your road?
A. It would be dependent wholly on what the business would be from year to year.
Q. Haven't you every reason to believe that the business
61 will increase in the future as it has in the past?
A. Yes sir, I hope that it will.
Q. Haven't you anticipated an increase since 1901 and 1902?
A. The management has.
Q. Have they provided for that increase in business?
A. They have been buying more cars.
Q. How many have they bought?
A. I don't know; Mr. Green or Mr. Liggett can better answer that question?
Q. I believe you stated how many cars they have?
A. Eight cars per mile.
Q. How many did you have in the fall of 1904?
A. I can't answer that.
Q. Don't know whether you had more or less than eight to the mile then?
A. I should say we have more now than then.
Q. As a matter of fact the shortage is worse now than then?
A. The shortage is worse in 1905 and '06 than it was in 1904.
Q. How about the shortage of 1906 as compared with 1905? Isn't it worse than it was in 1905?
A. It is not any better.
Q. What per cent of cars do you think you are furnishing to your customers at Stuttgart now?

Objection was raised and this question withdrawn.

Redirect-examination by Mr. WOOLDRIDGE.

Q. If you were compelled to fill all the orders made for State shipments as required by this order of the railroad commission, what effect would that have as to discrimination or furnishing cars to interstate shippers?
A. It would discriminate to the extent that we would not move but a small percentage of the interstate shipments.
62 Q. It would then work against the interstate shippers?
A. Yes sir.
Q. You would be compelled then to discriminate against inter-

state shippers if you were to furnish all the cars that are required by the State shippers?

A. Yes sir.

Cross-examination by Mr. EDWIN PETTIT:

Q. That rule that you refer to doesn't say does it that it shall apply only to State shippers?

Objected to. Objection sustained.

Q. Your answer to that question is based upon the supposition that the rule applies only to State shipments. Is that correct?

A. I stated that our interstate shipments amounted to about 70% and our State shipments to about 30%.

Q. You also said if you complied with this rule of the State commission it would discriminate against interstate shippers?

A. Yes sir.

Q. Now I ask you if that answer was based upon the theory that this rule applies only to intrastate and not to interstate shipments?

A. Yes sir.

Q. If that rule applies to both and you had sufficient cars it wouldn't work any discrimination?

A. Yes, but we haven't sufficient cars; we furnish 70% to interstate shipments and 30% to State shipments, that is the average.

Q. Assuming that the rule applies only to state shipments, I will ask you if you had sufficient cars at your command to transport the business of the public, whether you couldn't furnish same without discrimination of the interstate commerce law?

A. Certainly not. If we were to furnish for all state shipments we would only have enough left probably to fill 15 or 20 per
63 cent of the interstate shipments.

Q. If you had sufficient cars, couldn't you furnish enough for both interstate and state shipments?

A. Yes, if we had the cars.

Q. Have you sufficient cars?

A. There are not sufficient cars on the road now for the reason that I have given.

Q. Because the roads have them?

A. Because they have been moving off the road in traffic.

Q. Because the other roads have failed to send them back? Is that the reason?

A. That is partly the reason.

Q. Was there the same cause for the shortage in 1904 as today?

A. I presume.

Q. Was there the same cause for the shortage in 1905 as today?

A. A part of the shortage is on account of the equipment not being returned to us by foreign lines.

Q. Isn't that entirely the reason for the shortage. Did you hear Mr. Green testify?

A. No.

Q. Then I will ask you the question, if you had had all the equipment and all of the cars of the Cotton Belt railroad on your own line,

would you have had sufficient facilities for the transportation of freight?

A. If we had them all on our line I think so.

Q. The reason you didn't have them on your line was because other companies had them?

A. Because our patrons had loaded them off the line.

Q. Your company was receiving per diem on these cars wasn't it?

A. Yes, I presume they were receiving per diem.

Q. Now I will ask you the question,—was that the cause for the shortage in 1904 as well?

A. On account of equipment being loaded off the line?

64 Q. Yes.

A. Partially the cause, yes sir.

Q. Was there any other cause?

A. We didn't have as many cars in 1904 as we have now.

Q. Did you have enough cars of your own in 1904 to satisfy your customers?

A. I wouldn't want to state that.

Q. There was the same cause for shortage there was last year?

A. Same general cause.

Q. Because the other railroads had your cars. And yet you permitted them to keep your cars?

A. Will you tell us how to get them back?

Q. I just asked if it was because you permit them to keep your cars?

A. No we don't permit them to keep our cars.

Q. Do you know how many cars of hay were shipped out of Stuttgart in the fall months of 1903?

A. No I couldn't tell you without looking up the record.

Q. Do you know in 1902?

A. I wouldn't want to state.

Q. Do you know in 1904?

A. I wouldn't want to state.

Q. Do you know in 1905?

A. I couldn't state definitely the number of cars that went out of Stuttgart.

Q. Do you know how much hay was produced on Grand Prairie to be shipped out of Stuttgart in 1904?

A. In car loads?

Q. Yes.

A. No.

Q. Do you know whether they produced more in 1905

65 than in 1904 or less? Were you on Grand Prairie in 1905?

A. Yes sir, I have been on the road on Grand Prairie ever since I have been here.

Q. Do you know how much hay was produced in 1905? Was it a bad or a good year for hay?

A. I should say it was a good year from shipments.

Q. You don't know whether the crop was smaller in 1905 or not?

A. No I wouldn't want to state that definitely.

Q. Is there any other way for hay produced on Grand Prairie to be shipped except from Stuttgart?

A. Ship from any other station between Gillette and Stuttgart.

Q. Didn't Mr. J. I. Porter notify you of the number of cars that would be needed to transport the hay crop in?

A. I don't know that Mr. Porter notified me of the number of cars, still he might have. Mr. Porter writes me whenever he feels like it.

Q. You knew did you not?

A. I knew in a general way the number of cars required at Stuttgart.

Q. I believe you stated you were familiar with the shipments of hay from Stuttgart?

A. I didn't say I was.

Q. Are you?

A. I am in a general way.

Q. Do you know in a general way the number of cars that are required to transport hay from Stuttgart each year?

A. I couldn't state definitely.

Q. I believe you stated that in 1905 if you had had all your cars on your line you could have transported all the property that was offered for shipment. Is that correct?

A. If we had all of our cars we could have transported everything that was offered for a short period.

66 Q. I believe you also stated that the average length or period of time which a car remains away from home is 20 days. Is that correct?

A. I haven't made any such statement as that.

Q. Perhaps that was Mr. Green. Is that correct?

A. What is that?

Q. How long is the average period of time which a car remains away?

A. I suppose a fair average would be between twenty and thirty days.

Q. How many cars a day did you say you would have been required to furnish to transport the property offered? Didn't you say 1400 cars a day?

A. I haven't made any such statement as that.

Q. What did you say? About 1200 or 1400?

A. I said if we had all the cars we wanted we would load 1200 or 1400 for a few days, until we could get caught up with the movement.

Q. It wouldn't be necessary to have 1200 or 1400 to transport the business on your road?

A. That would be about what it would average for a few days because we are behind with our movement.

Q. How many cars would you need on an average?

A. For how long a time?

Q. During these months? How many cars would you need during October, November, December and January, on an average?

A. I can make up those averages for you. I wouldn't want to state positively.

Q. Approximately how many? 1200 a day or 500?

A. I presume if we had 1200 we could transact our business for the present.

Q. If it would require 1200 a day to transact your business and a car on an average doesn't return for 20 days, how many cars

67 would it take before you would have enough?

A. Every car doesn't load for 20 or 30 days. You asked about the hay product and I said 20 or 30 days.

Q. Then the general period of time that a car remains away from home isn't 20 days?

A. I don't know what that average is.

Q. Would it be as much as ten days?

A. I should think it would be somewhere between 15 and 30.

Q. If that is correct, how do you figure that 10,000 cars is sufficient to transport all property offered. In other words, if it takes 1200 a day, and the average period of time which these cars remain away from home would be 15 to 30 days, how many cars would that require?

A. We don't depend on our cars altogether; it wouldn't take 1200 cars a day if we could keep up; as an illustration, our movement yesterday was 1013 cars, total cars handled on the road.

68 *R. J. McElhaney's Deposition.*

Mr. R. J. McELHANEY, being duly sworn, testified:

Examination by Mr. WOOLDRIDGE:

Q. Were you working for the St. Louis Southwestern Railway at Stuttgart in the fall of 1905 and in January 1906?

A. Yes sir.

Q. Did you have to do with the distribution of cars to shippers there?

A. Part of the time I did, yes sir.

Q. Who are the shippers at that point and who were they at that time?

A. There are a great many of them.

Q. The principal shippers I will say in hay?

A. Mr. Porter, Whaley, Conn & Underwood, Reinsch, Holmes and Galvin.

Q. Who was the largest shipper?

A. Mr. Porter was considered the largest shipper.

Q. Who comes next, so far as you know?

A. Mr. Whaley, to the best of my knowledge.

Q. Who after Mr. Whaley?

A. I always considered it a stand-off between Conn & Underwood and Holmes, in Holmes' favor.

Q. How did Mr. Reinsch compare?

—. He came in behind these two I always figured.

Q. How were cars distributed to shippers when you didn't have enough to supply all?

A. Well we tried to work it as near on a percentage basis as we could, giving the largest shipper preference.

Q. You mean in accordance with their business?
A. In accordance with their business.
Q. You don't mean you preferred the largest shippers?
A. No, I don't mean we preferred him.
Q. You mean the large shipper would get more cars?
69 A. He would, because he was entitled to more.
Q. What instructions did you receive from your superiors as to the distribution of cars when you didn't have enough to supply all?
A. I have no record of any definite instructions at all; there was an understanding that we were to distribute them on a basis of our ability.
Q. That was the rule of the company was it?
A. That was considered a rule of the company.
Q. Do you know how many cars Mr. Porter received for the month of November 1905? Can you give the number of cars that were received or shipped out by these shippers that you have mentioned?
A. Yes sir, I can give you the number of cars that were shipped out by each of the shippers I have mentioned.

PLAINTIFF'S COUNSEL:

Q. Are you testifying from memory or the records?
A. I take this from the records.
Q. Have you got a copy of the records?
A. I have got copies of the way-bills.
Q. Did you make those copies recently?
A. They are taken right off the way bill at the time the way bill is made, an impression.

DEFENDANT'S COUNSEL:

Q. I wish you would please give them.
A. Mr. Porter: November 21, December 32, January 44.
Mr. Whaley: November 19, December 28, January 38.
Mr. Holmes: November 12, December 26, January 31.
70 Conn & Underwood: November 7, December 22, January 26.
Reinsch: ——.

Mr. PETTIT: We object to the introduction of this evidence unless there is an understanding that the cars alleged to have been ordered in the complaint were not furnished. We contend that the cars referred to in this particular complaint were not furnished.

Mr. WOOLDRIDGE: The cars were furnished equitably. We do not know what cars they were; do not know any difference.

COURT: It is admitted by the pleadings that the cars demanded were not furnished.

Plaintiff objected to the introduction of the evidence; its objection was overruled, to which it excepted.

WITNESS:
Reinsch: November 9, December 18, January 24.
Galvin: November 5, December 11 January 16.

These are the principal shippers from Stuttgart.

Q. Those are the principal shippers?

A. Yes sir, the heaviest shippers.

Q. From your knowledge of the business of each one of these shippers at that time, do you say to the jury that is about a fair, equitable distribution of the cars?

A. That is as fair as we could arrive at to the best of my knowledge.

Q. There was no effort made to discriminate against anyone of the shippers?

71 A. Had no particular reasons for doing so and didn't try to do so.

Q. What did you try to do?

A. We tried to give every man his pro rata, I suppose you would call it, of the cars that we received for distribution.

Q. When you turn the cars over — the shippers are there any specific orders given by you as to how they are to be shipped, or was that left to them?

A. There were to a certain extent. Sometimes we get a foreign car that we route home, say on some connecting line to Chicago; may be Mr. Reinsch would have a car of hay for Chicago; I would give him this car; maybe it would be a C. B. & Q. car. I would say this car is to be loaded to Chicago. But so far as Cotton Belt cars were concerned and other cars without home route that we didn't want to load right back home, we gave it to them with the understanding that they could load the Cotton Belt cars to any point that they desired, that is, outside of any points that there might have been an embargo on off of this line to any line we were allowed to send Cotton Belt cars on.

Q. Was there any objection to loading a Cotton Belt car to any point in Arkansas?

A. Not that I remember of.

Q. As to these lines that you said there was an embargo on— you know why that was the case that they didn't want to send to certain lines?

A. No; I guess it wouldn't be an embargo; it would be a restriction.

Q. Isn't it a fact that you wouldn't send to lines that never furnished the Cotton Belt cars?

A. To lines that had agreed——

Q. I believe you stated there were some lines you didn't send Cotton Belt cars to. Do you know why that was so?

A. I am not in position to answer that.

72 Q. There was what you call a car shortage at that time?

A. There certainly was.

Q. You were not able to furnish all the cars that were ordered by shippers at Stuttgart?

A. Not by any means.

Q. You say to the jury then, that so far as your best judgment goes, Mr. Reinsch got his proportion of the cars that you were able to furnish?

A. To the best of our judgment he did. We tried to treat him equally with the rest.

Cross-examination by Mr. EDW. PETTIT:

Q. As I understand it, you don't mean to state that any of the cars furnished to Reinsch were the cars referred to in this specific complaint?

A. I don't know anything about the complaint.

Q. These cars referred to are the cars that were furnished and not the cars referred to in this case?

A. Yes sir, the cars that were furnished by us; I don't know anything about the complaint.

Q. Do you know how many requisitions for cars were made by Mr. Reinsch during those months?

A. No I couldn't tell you just how many cars he ordered.

Q. How many cars do you say were furnished him during all these months?

A. The books show that he got 9 in November; 18 in December and 24 in January.

Q. Do you know whether it is true he made requisiton for 198 cars during that period and only got 51?

A. I couldn't say it was true; I know he was asking for cars.

Q. You know he only got a small proportion of what he ordered?

A. I couldn't say it was true.

73 Q. You know he ordered over 100?

A. I don't know.

Q. Do you know that in January it is a fact he only got two cars before he made complaint to the Railroad Commission and the balance afterwards?

A. No sir.

Redirect examination by Mr. WOOLDRIDGE:

Q. Have you got October?

A. I think so. I went over October a little rapidly; I am satisfied it is very near correct.

Q. Would you say that the same distribution applied?

A. We distributed them on the same basis.

Q. That has always been your rule when you could not furnish all the cars ordered?

A. Yes sir.

Q. Is that the rule now?

A. Always has been.

Q. Do you know where any of these cars that you refer to that were furnished to Mr. Reinsch were shipped to?

A. I can't call that to mind. I could tell you right quick.

74 *A. B. Liggett's Deposition.*

Mr. A. B. LIGGETT, being first sworn, testified:

Examination by Mr. WOOLDRIDGE:

Q. What business are you engaged in?

A. I am superintendent of transportation of the St. Louis Southwestern Railway Co.

Q. How far does your jurisdiction extend?

A. Over the entire system.

Q. How long have you been acting as such superintendent?

A. Nearly four years.

Q. What have you to do with the movement of cars or looking after cars?

A. I have charge of the equipment and equipment accounts, transportation management.

Q. You have charge of all cars on the Arkansas and Missouri division?

A. Yes sir.

Q. Is that Arkansas and Missouri?

A. Yes sir.

Q. Does that embrace all of the line from Texarkana north and branches, including the Shreveport branch?

A. Yes sir.

Q. What are the rules of the company as to furnishing cars to shippers when you haven't sufficient cars to supply all demands?

A. Why the rule is that the various shippers must each bear their proportion of the car shortage.

Q. Then you give each one his proportion?

A. Yes sir..

Q. How is that arrived at, by the number of cars shipped or amount of business done?

A. By the amount of business when a man's capacity is known, when he is in a business that you can determine his capacity, otherwise by the car orders.

75 Q. State whether or not there was a car shortage in the months of October, November and December 1905, and January 1906, and if so, what brought that about. Explain it fully to the jury.

A. Why we had a very serious car shortage, the worst we had ever had up to that time.

Q. What caused that Mr. Liggett?

A. The cause of that was because our cars were away from home and with connections, and we were unable to obtain the return of the cars from these connections, or to obtain other cars to replace them.

Q. What about the traffic over the Cotton Belt and other railways during that season? Was it heavy or not?

A. Unusually heavy.

Q. What is the custom of railroads in handling each others' cars, making exchange?

A. Why the custom is for cars to run through from one road to another. Pretty near—I presume 95% or 97% of all the railroads in this country are now settling for cars on the per diem basis, that is, they pay so much a day for the use of a car. There are a few small roads that don't pay per diem, but very few; they pay on a mileage basis, but the per cent. is so small they don't amount to anything.

Q. What is that per diem or was it at that time?

A. Per diem for the first three years was 20 cts. per car per day Since the 1st of July the charge has been 25 cts. per day.

Q. State whether or not that charge is a revenue or simply a basis of settlement between the companies?

A. Just simply a basis of settlement. For instance, we have Illinois Central cars 10,000 days in a month, and the Illinois Central should have Cotton Belt cars 10,000 days in the month, one would off-set the other; it wouldn't make any difference whether it was twenty cents or twenty dollars a day, but the 20 cts. or 25 cts. a day is used as settling basis. For instance, if the Illinois Central had our
76 cars 100 days more than we had hers, they would pay us 100 days at the per diem rate. We wouldn't pay them anything. That would simply be a settlement of the balance.

Q. About what per cent of the business originates on the St. Louis Southwestern?

A. About seventy per cent.

Q. That originates on the line and is sent off?

A. About 70 per cent. Of course that varies a little in different seasons, but that is a pretty fair average.

Q. What effect does a condition of that kind have upon the cars of the company?

A. Why it takes our cars away from home to the lines of our connections. In other words, we are an originating line, originating more business than we receive from connections, which has a tendency to take our cars away from home.

Q. Do you know about what per cent of the cars of the St. Louis Southwestern Railway Co. were upon foreign lines during the months of November and December 1905 and January 1906?

A. Yes sir, I can tell you approximately.

Q. Have you compiled a statement of it?

A. Yes sir, I have compiled a statement of exact figures, that is, averages for those months. My recollection is that we had from 5500 to 6200 of our cars off the line on foreign lines during that period.

Q. Before you get to that,—how many cars did the St. Louis Southwestern Company have at that time—how many freight cars?

A. We had approximately 10,000 cars in revenue service.

Q. How many per mile?

A. About eight per mile.

Q. How does that compare with the other large railroad systems in the United States?

A. Why it is ahead of most of them.

77 Q. Is there any way of telling how many cars per mile each company has?

A. Yes sir.

Q. Do you know?

A. Yes sir, they publish it in the Railway Equipment Register, showing the mileage and the cars that they own, each company publishes that.

Q. Can you give the cars per mile for——

Plaintiff objected to the witness testifying on this subject unless it is shown that he knows how many cars other railroads have by more positive information than that mentioned.

WITNESS: I certainly didn't count all the cars of the other roads, but the only record that we have is that they furnish a record of every car they have got, showing its capacity and all about it, and we do the same thing with our cars; we know just how many cars they have and they know just how many we have. They publish their mileage and so do we in the same book. It is an interchangeable book that our car departments of each road interchange with each other for our necessary information in handling foreign equipment. So when you find a foreign car on your road you know just what kind of a car it is, the length of it, size of it, whether it is a box, flat or coal car. Any car in the United States that book will tell you just what it is.

Q. Does that come within your business?

A. Yes sir.

Q. Is it a part of your business to keep up with the number of cars and the record of them?

A. Yes sir.

COUNSEL FOR PLAINTIFF: Is it a part of your business to

78 keep up with the number of cars that other railroads have?

A. Yes sir; we keep up with them.

Q. It is a part of your business is it?

A. Yes sir.

COUNSEL FOR DEFENDANT: That is done for your information so you can manage your business?

A. So we know what each road has got.

Q. Have you made up a statement from the information that you have of the various roads?

A. Yes sir.

Q. Is that the statement that you made up? (producing a written statement).

A. Yes sir, this is the statement.

Q. Please name each road there, giving the number of cars per mile that each had. Does that apply to the fall of 1905 and January 1906?

A. Yes.

COUNSEL FOR PLAINTIFF: Mr. Liggett, do you have any personal knowledge as to the number of cars per mile they have on their roads?

A. Only as shown on this official guide.

Q. And that guide is furnished you by the other lines?

A. It is furnished by the equipment register company, who get the information direct from each company.

Q. That book is furnished by whom?

A. By the Printing Company,—the Equipment Register Company.

Q. Where is that company?

A. New York.

Q. They send it to you by mail from New York?

79 A. Yes sir, and we correct it each month.

Q. The only knowledge you have is that gotten from that book?

A. Yes sir.

Plaintiff objected to the testimony offered, but the objection was overruled.

COUNSEL FOR DEFENDANT: Call each road.

A.—

St. L. S. W.....	1332 miles,	10659 cars,	8	per mi.	
K. C. S.....	762 "	7488 "	9.8	"	
They are a coal carrying company and have a large coal equipment.					
T. & P.....	1833 "	9190 "	5	"	
St. L. & S. F.....	5086 "	29041 "	5.7	"	
St. L. I. M. & S.....	2356 "	13970 "	5.9	"	
Mo. P. System.....	6237 "	46111 "	7.3	"	
I. & G. N.....	1104 "	3911 "	3.5	"	

COURT: There is no use going over the entire list.

Here counsel for defendant offered the statement in evidence and same was allowed to be introduced, over plaintiff's objection.

Q. Are those the principal trunk lines in the United States?

A. No, those are just a few of them.

Q. They are the largest lines are they not?

A. They are not the largest; some of them are pretty large systems,—the Missouri Pacific, Rock Island, Frisco and Wabash, quite a number of large roads.

Q. How many in that list had more cars per mile than the St. Louis Southwestern Railway Co.?

A. The Kansas City Southern, Big Four and C. & A.

Q. How many cars did the company have in service the month of November 1905?

A. How many freight cars do you mean?

Q. Yes sir, if you have any memorandum use it.

80 A. In revenue service in the month of November we had 9,517 cars,—in revenue service.

Q. How many did you have on your own line in that month of your own cars?

A. We had an average per day of 3982, some days a little more and some a little less.

Q. How many of your cars during that month on an average were off the line on foreign connections?

A. We had 5535 off the line, an average of 5535.

Q. How many foreign cars did the St. Louis Southwestern have during that month?

A. An average of 2519 per day.

Q. What was the average per cent of St. Louis Southwestern cars off the line during that month?

A. 58 per cent.

Q. Please give the same state of facts during the months of December 1905 and January 1906.

A. In December 1905:

We had in revenue service	9673	cars
On the line, that is the average for the month	3359	"
The average off the line	6075	"
We had an average of foreign cars on the line during the month of	2706	"
Per cent of our home equipment off the line	63%.	

Q. How about January 1906?

We had a total equipment in revenue service of	9650	cars
There were on the line on an average	3428	"
Average off the line	6222	"
We had on the line during the same months of foreign cars	2613	"
Per cent of our equipment off the line during the month.	64%.	

81 Q. Have you made up a statement for those three months of the shortage of cars, showing the number of cars ordered and the average that you were able to fill?

A. I have for the A. & M. Division.

Q. What part of the road does that embrace?

A. The line north of Texarkana.

Q. What was the average daily shortage for those three months?

A.—

The average shortage in November, we were behind our orders each day	646	cars.
December	693	"
January	660	"

Q. You mean then that was the average shortage?

A. That means that we were running behind our orders all that time?

Counsel for defendant asked to introduce that daily statement, which he was permitted to do, and the same was considered as read in evidence.

Q. Now Mr. Liggett, how long did that car shortage last? Do you know,—about?

A. Last year it lasted to along in March. It began to break in March.

Q. State what effort the company made, if any, during the sum-

mer of 1905, to get its cars home from connecting lines, and to get cars from them—foreign lines?

A. Why we commenced as early as July, the latter part of July and first of August, placing orders with our connections for empty cars, writing and frequently telegraphing connections, asking them for our own cars or for other empty cars. We continued that all through the car shortage. In looking through our records the other day I found in a hasty examination that I could pick out as high as 6890 cars we ordered from our different connections during the shortage. I presume that we could find a good many more, and the reason that we didn't order more was because we couldn't get these.

82 Q. What effort did you make to get your cars home prior to the busy season of 1905?

A. Why we did some little transferring where we could get cars to transfer into, and we continued during the entire fall months doing that, but unfortunately we couldn't get very many cars to transfer to. We would frequently pick up a car from a connection that we would use to transfer a load into and turn our own cars back, and we had — up with the managements of the different roads who were holding our cars urging them to return them frequently.

Q. You were unable to get cars that had been sent off your own line back home?

A. Very few.

Q. State to the jury why those cars are not sent back in a car famine or shortage?

A. Well there are several reasons. The chief reason is that the lines holding the cars need them themselves in their local business and so use them. That is the chief reason. And so long as they do need it, as a rule they will hold on to it. Of course we try to force it home by penalizing the car, that is, requiring them to pay $1.00 a day for it. Instead of paying the 20 cts or 25 cts a day they have to pay $1.00 a day after they have had the car thirty days and have had ten days' notice of the penalty, that is, thirty days in all. You can serve the notice when a foreign line has had the car in its possession 20 consecutive days. Unfortunately that don't move our cars home. It usually moves them off the line that is penalized, but they don't always move it homeward; they would give it to some neighbor other than us and to make a move to any connection breaks the penalty, and they use the same, paying the 20 or 25 cents a day again for thirty days additional before you can penalize them again. The result was that we didn't get very much penalty and had no success in getting our cars moved home through the penalty effort.

83 Q. What were you able to do as to getting foreign cars after this congested state of traffic or car shortage had ended or about ended?

A. Well the movement,—as I said, the shortage began to break in March, and we began getting empties pretty freely from our connections, and were very soon in a position to fill all orders just as soon as the connections began giving us empties; of course after the

car shortage was over we could furnish cars as fast as they could be loaded.

Q. State to the jury if there has been any effort among railroads to adopt any system by which these cars could be forced home from foreign lines?

A. Well we have had a rule, a car service rule, that a foreign car must be loaded and moved only in the direction of home. Now if all the lines would comply with this requirement or with that rule, foreign cars would get home, ours would get home, that is, if they weren't moved in an opposite direction. When they were moved if they were moved toward home we would get them home, but, unfortunately, there was no penalty applied to a violation of the rule, and the result was it became simply a dead letter.

Q. Has any recent action been taken?

A. They have recently agreed to increase the per diem rate on the car with a view to forcing them home that way.

Q. What is the sole object of increasing the penalty? Is it for revenue or to force the cars home?

A. You mean per diem?

Q. Yes, per diem?

A. Well, from the proceedings of the meeting, which was a very stormy one, it was very clear that the object was to get the cars home. The lines that have now sufficient equipment to take care of their business and couldn't keep it at home were very much in favor of the increased per diem.

84 Q. What effect have these companies that have a low number of cars per mile upon the lines that have a large number of cars per mile?

A. Why they naturally hold their cars to do their own local business with, and simply because it has been cheaper for them heretofore to use your cars than to own equipment of their own, so long as they could get cars to use.

Q. What will be the effect of raising per diem as to building cars?

A. It ought to stimulate the building of cars because the car owners with the per diem rate at fifty cents per day won't lose anything as they have been doing heretofore under the twenty and twenty-five cent basis.

Q. What do you say to the jury as to the ability of the company in the fall of 1905 and winter of 1906 to have taken care of all the business tendered it if it could have gotten its cars from foreign lines or gotten its pro rata from the connecting lines?

A. If we had had our full equipment at home, or foreign cars sufficient to be equal to our full equipment,—in other words, with 10,000 cars on the line, I do not think that I have ever seen the time when any industry should suffer on our line for want of cars,—if we could get 10,000 on the line and keep them.

Q. What is the custom of the St. Louis Southwestern with connecting lines as to the exchange of cars. How is that done? What are the rules?

A. The rule is that equipment shall run through,—of course

there is a certain class of freight that must run through because you can't transfer it without damaging it very seriously, and with the immense tonnage being handled between connections it would be almost an impossibility to transfer, especially in these times when labor is so scarce; you couldn't get labor to do it. You would congest your junction points so that your traffic would be de-
85 layed very seriously, and the result is that unless in very extreme cases, such as we are in right now, that is, when we are desperately short of cars to handle our business, cars have to run through and do run through.

Q. Would it be possible for the railway lines to carry the traffic that is tendered them without this exchange of cars?

A. I do not think so.

Q. Would it be practicable railroading without that?

A. It would be entirely impracticable without that.

Q. What would be the effect if that rule should be enforced now as to the traffic, or in the fall of 1905?

A. If that was attempted you would see a car shortage about twice as bad as it is.

Q. So that the exchange of cars is a benefit rather than a disadvantage?

A. It increases the car supply.

Q. What are your rules as to getting cars from your connecting lines when you furnish your connecting lines with cars to ship?

A. They should participate in furnishing equipment for business going to their line from us. In other words, if we deliver them say 100 loads, they are due us 100 cars, either loaded or empty, to offset it, either our own cars or foreign cars; it don't make any difference. For instance, the Iron Mountain we will say have practically 300 Cotton Belt cars on their line just now. Now to offset that we should have 300 Iron Mountain cars on our line. In other words, the cars should balance. If we haven't that many cars and we get short of cars for Iron Mountain loading, we call on the Iron Mountain to equalize that equipment. If we only have 200 we call on the Iron Mountain to equalize by giving us 100 empties, and frequently, if we have more loading for them and can't furnish Cotton Belt equipment, we then call on them for more than a balance.

Q. Does that apply to other connecting lines as well?

86 A. Certainly.

Q. Did you make any demands upon your connecting lines for these cars, did you in the fall of 1905 and winter of 1906?

A. Yes sir, we have been demanding all the time.

Q. Were you able to get them at that time?

A. No sir, very few.

Q. About how many cars were you short on an average per month, of foreign cars that you should have had?

A. This statement submitted in evidence will show. We had in November off our line 5535 cars; foreign cars on the line 2519. We were short during the month of November 3,000 cars.

Q. From foreign lines?

A. Yes sir.

Q. How much were you short in December and in January?

A. 6075 off the line. 2706 foreign cars on the line. The difference between these is about 3300 cars.

Q. How about the same in January 1906?

A. It was worse in January. We had 6222 off the line. 2613 foreign cars on the line. That would be 3700 cars short in January.

Q. State to the jury if it was possible, under the custom of railroading, for the St. Louis Southwestern to have gotten the cars of its own or gotten those cars from connecting lines, under the custom of roads?

A. We did everything that I could think of to get them back and didn't succeed.

Q. Would you say to the jury that f you had as many cars as the company owns you could have reasonably filled all the orders?

A. I don't believe an industry on our lines would have suffered if we had had those cars, and they did suffer very seriously, some of them, in fact all of them suffered more or less.

Q. Has the company increased its cars in the last few years?

A. Yes sir, we have bought quite a number of new cars,
87 and have rebuilt quite a number of old cars in the last three or four years. We have spent approximately about three million dollars for new equipment.

Q. So then you have tried to keep pace with the anticipated increased business?

A. Yes sir.

Q. What was the result of your efforts prior to the summer of 1905 as to getting cars from your connections in order to take care of the fall business? Had you had any trouble prior to that time?

A. We were usually short a little for a couple of months during the busy season even prior to 1905—in 1904 we were some short. But I do not have any recollection of a shortage ever running beyond the holidays until last year.

Q. And that extended until March you say before there was any ease up?

A. Yes sir.

Q. Did you expect to be able during the summer of 1905 to get your own cars home and cars from connecting lines as theretofore?

A. Well we started along in the latter part of July or early part of August to stock up on cars, that is, to accumulate a lot of cars on the line to equal our equipment so as to protect the fall rush of business, but we weren't able to get them then, starting in as early as July, we failed to get them, that is the latter part of July.

Q. What result had you had prior to that?

A. We usually succeeded in getting a very good supply even in August and as late as September.

Q. State if you have any trouble in getting cars from your connections when there is no car shortage?

A. None whatever. They are very anxious to give us cars so as to get the return business.

Q. Then why do they hold your cars during the car famine or shortage?

A. Use them on their own lines; they need them; they are short, too.

88 Q. Will they begin to send your cars before the congested traffic eases up in their territory?

A. It is doubtful if they will.

Q. Was the car shortage of 1905-06 the worst you had had up to that time?

A. Yes sir.

Q. Can you give the jury an idea of what was the cause, what produced the car shortage?

A. The car shortage with us is produced because we are an originating line, that is, we load more ton-age, more cars to our line connections than we receive from connections loaded and empty both, and the result is that we get short of cars.

Q. What was the state of the traffic generally in the country in 1905-06?

A. It was enormously heavy.

Q. How was it compared to former years?

A. Why ours was much heavier, and I have reason to believe that the other lines were in the same fix from the letters that reached us.

Q. What did the connecting lines do with regard to furnishing their cars and returning your cars?

A. Practically nothing during that period; they gave us very little assistance.

Q. Did you ever experience any such trouble prior to that fall and winter with your connecting lines?

A. Yes sir, we have frequently been unable to get cars just promptly from connections, and have frequently had what you might say a shortage for a short time, a temporary shortage, but nothing to compare with the shortage of 1905 and 1906.

Q. Did you ever make any effort in order to relieve the car situation with your connecting lines, by trying to force the transfer of loading of your cars?

89 A. Oh yes, we do that frequently.

Q. What was the result of that effort?

A. The result was we were not able to do enough transferring to justify us in continuing. It delayed the traffic and delayed our cars.

Q. What effect would the rule of the Arkansas Commission mentioned in this case have upon the interstate shipments, if your company was required to furnish all the orders that shippers may make for State shipments, regardless of the condition of the company as to cars?

A. It would discriminate in favor of State loading as against interstate of course.

Q. Take the conditions of the months in 1905 and 1906 as mentioned heretofore, what would have been the effect upon interstate shippers if you had furnished all the orders for state shippers?

A. The result would have been furnishing a much less per cent. for interstate traffic.

Q. Would that work a discrimination against interstate traffic?

A. Certainly.

Q. Would that be the result, under a condition of that kind, in complying with the order of the railroad commission?

A. When we are short of cars—certainly.

Q. Take the conditions as they existed at that time. Would an additional number of cars by the company have relieved the situation to any extent?

A. Now it depends on what additional number you might refer to. Of course additional cars on the line would relieve the situation just that much, if you have enough of them to keep supplying all.

Q. This being an originating line, what would become of the cars?

A. Why they would naturally drift to other roads.

Court took recess until 7:00 P. M. of the same day, at
90 which time the examination of this witness was resumed by Mr. Woolridge.

Q. Mr. Liggett, what else did the company do in the fall of 1905 besides making orders on its connecting lines trying to get cars for its home line in order to take care of the fall business?

A. Why we did all the transferring that we possibly could at junction points, continued to do that, and also during the months of July and August we laid in a heavy stock of company coal, some 35,000 tons, to be used during the busy season, so that we wouldn't have to take our cars out of commercial business to handle our company coal.

Q. Would that give you greater facilities for handling the business in the busy season?

A. Yes sir, we naturally had these cars that we would have had to use in our company business during that busy period to use in commercial business. We collected up and filled all of our storage capacity at the different terminal points and engine coaling points.

Q. Tell the jury what the company has done the last three or four years in increasing its cars to handle the tonnage or freight?

A. During the last three or four years we purchased outright some 3040 new box cars. These were all built to the new 36 ft. standard. We also had 150 new stock cars built. We had 300 new coal cars built for handling our company coal so that we could keep our box cars in commercial service. We had a large number of our cars, some 1500 is my recollection, rebuilt, cars that were worn out and unfit for service.

Q. That would make then near 5,000 cars?

A. In that vicinity; we have increased our equipment about, that would be about 5,000 cars, or at the rate of 1,000 cars per year.

Q. If the company could have gotten its cars from foreign lines or could have gotten the cars it was entitled to from connecting lines at the beginning of the season of 1905, state whether or not
91 the company had motive power to have moved the cars and handled the freight?

A. Yes sir, we had ample motive power to have taken care of it. Our motive power is good and in good condition.

Q. What has the company done recently to increase even its motive power?

A. Our superintendent of machinery is now in Philadelphia examining and inspecting 20 new locomotives that we have just purchased; they are ready to move to us.

Q. Please state to the jury if the company had been able to have gotten the 2,000 cars that Mr. Green spoke of having tried to obtain in August 1905,—with these cars, if they could have been obtained, and with the facilities that the company had,—if they could have gotten back their cars from foreign lines, or their pro rata of other lines' cars, what would you say to the jury as to its ability to handle the traffic tendered it?

A. Well, in that event I apprehend that we would have loaded the cars locally probably a few times on our own line, and that they would have been loaded off to connections just like the balance of our cars were. Of course we would have increased our loading these 2,000 cars probably a couple of times, but I don't believe it would have prevented a car shortage unless we could have had them returned from connections.

Q. Would there be any way to prevent a car shortage like you had in 1905 unless you could get your cars back?

A. No way to an originating line, a line that originates so much more freight than it receives, like we do.

Q. I wish you would state to the jury fully what is the custom with your connecting lines as to furnishing you a certain pro rata of cars,—how is that done?

A. The custom is for each line to load its cars to run
92 through with the business, and the connection receiving the business reciprocates by delivering to you their cars, either your own or their own cars or some other road's cars sufficient to offset, either loaded or empty, so that each line's equipment would remain intact.

Q. Where do your cars go principally when they are sent off of your line?

A. Our patrons load our cars all over the United States and Canada.

Q. So then the cars that belong to the company that get on these foreign lines are all over the United States?

A. Scattered everywhere; there isn't a State in the Union that hasn't our cars; even Canada. The Grand Trunk today have practically about 100 of these cars.

Q. Would it be practicable, on the refusal of these connecting lines to send your cars home, to get possession of them in the legal way?

A. I do not believe it would be at all possible to do it; certainly it wouldn't be practical.

Q. Why.

A. The cars continue to move from one line to another, and they are scattered all over the road, at every station, in every train; I

don't believe it would be possible. You might get hold of a few of them but a few wouldn't help.

Q. In order to illustrate this to the jury, could you give them an idea on any day certain in the past as to how your cars were distributed on other lines?

A. I have information like that in my satchel I can get you.

Q. Can you furnish it?

A. Yes sir.

COUNSEL FOR PLAINTIFF: When is that?

A. This last check is the last day of last month.

Counsel for plaintiff objected.

93 Q. Could you give just a few illustrations?

A. It is practically the same condition. Possibly I could find you a day in the period.

Q. Can you find a day in 1905?

A. No sir, I have got some in 1903.

Counsel for plaintiff objected but the witness was permitted to testify in regard to the conditions generally and give one day as an illustration.

DEFENDANT'S COUNSEL:

Q. Just take one day as an illustration?

A. Our cars on the last day of last month were distributed as shown on this report, (reading):

B. & O. R. R.	65 cars
C. & E. I.	69
C. P. & St. L.	36
C. & A.	81
Big Four	160
C. B. & Q.	178
C. R. I. & P.	33
C. & R. I. proper	194
Dallas Terminal Union Depot	28
Eastern Texas	28
Ft. Worth Belt	31
Ft. W. & D.	132
Ft. W. & R. G.	24
G. C. & S. F.	205
H. E. & W. T.	27
H. & T. C.	119

Those happen to be Southern companies but we can go on:

I. C.	270
Mo. P.	443
Grand Trunk, for instance	78

94 Q. Without extending it any further are they all distributed in that way?

A. Scattered over practically every railroad in the United States.

Q. And Canada too?

A. In Canada too.

Q. What was the condition in 1905 as to similar comparisons?

A. Scattered just in the same way.

Q. Does your department have a daily report of all cars?

A. Yes sir, we keep an accurate record of the movements of each car each day. Every car is located on the line and recorded at the station at which it is located. If it is put into a train the conductor's wheel report shows where he moves it to, picks it up from that station and moves it to some other station. We show that on our record of that car. When it is moved to another station we show that on the record; shows the day it is moved and where it is moved to. When it goes to a junction and is turned over to another railroad the agent makes what we call an interchange report, showing this car delivered to this connection, and he obtains the signature of the connecting line's agent for that car. The connecting line receipts to us for that car and we charge that car to that line, until they deliver it to some other line or back home. If they deliver to some other line they in turn take a receipt for that car from the agent of the connecting line that they deliver to and send us what we call a junction card advising us of the delivery of that car, when that connection is charged with that car until they can show receipt for delivery to some other company. These receipts show the date and hour the delivery is made. We go over our records and charge this car up to each road for the number of days that they have it in their possession. The car will wander around some time for two or three years before we get it back. We have got cars now that we haven't seen for over two years; haven't been upon our road; have been in continual use on foreign lines for over two years. A car that is lost or destroyed, the railroad last receipting for it has to settle for it. They have either got to show us the disposition they made of the car or pay for it in case it is lost.

Q. So that is the way you keep track of your cars?

A. Yes sir.

Q. And of course your company is all the time handling records of their cars sent to you?

A. We keep exactly the same record. When we get a car from a foreign road we give them a receipt for that car and it is charged to us until we get a receipt from somebody else for it. We have to settle per diem on that car until we deliver it to somebody else, and it is up to us to prove that we delivered it, we have got to have that receipt.

Q. Are there any other troubles and difficulties in railroading in case of a car shortage as to terminal facilities in these large cities?

A. Yes sir.

Q. Explain to the jury the difficulties in that respect as to getting cars back?

A. During this immense movement of traffic that we have been having of late years the large terminals are utterly unable to take care of the business. St. Louis and even Memphis had to establish and build a line outside of the city so as to get room enough to

handle cars. They have been building increased facilities but the trouble has been they have got to get out of the cities to do it; they can't get the room or the space for the facilities in the city; they establish large storage yards outside and store the cars until such time as they can make room for them to get them into the city and unload them or release them as the case may be, consequently it causes enormous detention of cars for lack of proper facili-
96 ties for handling them. Of course that delays your cars and makes the shortage more acute; the longer you delay a car making a trip the fewer trips it can make and the less business of course it can do. The quicker moving and quicker loading and unloading you can get the more business you can do of course. When it moves slowly it tends to make the car shortage more acute.

Q. Has there been a special increase in the tonnage during 1905 and 1906?

A. Yes sir, a remarkable increase.

Q. How do you account for that?

A. The general prosperity of the country; the increase has been general everywhere. For instance, we are manufacturing today three times the pig iron that we did ten years ago,—that business, iron and its products has increased 300 per cent in ten years. Coal is the same, and grain, cotton, lumber interests; they have all doubled or run from 50 to 100 per cent increase in the last ten years, and railroads of course have met it to a certain extent too,—they have increased their cars aproximately 33 per cent in that period; and if you take into consideration the increased capacity of those cars above what they manufactured ten years ago, they have increased their carrying capacity 50 per cent in equipment, and about the same in locomotives, but the business has grown faster than that, the business of the country has grown faster, and the result is that they become congested and make the situation worse.

Cross-examination by Mr. CLYDE PETTIT:

Q. I believe you stated that on an average during the months of October, November and December and January there were 6,000 approximately of your cars on other roads. Is that correct?

A. I don't believe I stated October.

Q. Anyway, in the fall of that year? Is that correct?

A. Yes sir.

Q. Don't you think it bad management on the part of
97 railroads to let so many cars remain on other railroads, from which you get no compensation, freely and voluntarily, and let your shippers suffer? Isn't that bad management to let them use your cars free?

A. That is simply an opinion.

Q. I want to know what your opinion is?

A. My opinion is that we couldn't avoid it under present conditions, and that is the best we can do.

Q. What does a car cost?

A. You can contract now for standard 36 ft. box car such as we are getting now for about $950 or $960, that is about the best figure

you can get on it, and they don't care whether they build it for you then or not.

Q. Suppose that a car load of products is shipped from your line on your car to a point off your line, say Chicago. What part of the freight do you get on this car after it leaves the end of your line?

A. That is—the divisions are arranged between our different traffic departments. I don't know what that would be.

Q. It is a fact then that on shipments of car load products to points off of your road in your cars that you get all of the freight on your line and a proportion of the freight after it leaves your line, until it arrives at its destination?

A. No sir; I don't so understand it; I am not an authority on rates, that is not in my department; but I don't think that is a fact; we simply get our proportion of the rate; if the car runs through we get our per diem on the car in addition to the rate, but that has nothing to do with the rate.

Q. In other words, if I was shipping a car of freight from De Witt to Chicago, it would go on your line as far as St. Louis, assuming St. Louis as the junction?

A. Yes sir.

Q. Now you would get your proportion of the through
98 rate, and in addition to that you would get your per diem on the car from St. Louis to Chicago?

A. For the time that they hold the car in their possession.

Q. And your proportion of the through rate would be greater than the rate from the starting point to the end of your line?

A. I do not know; I can't answer that question.

Q. A moment ago, when I asked you what proportion of the freight you received on the car after it left your line and before it arrived at its destination, you stated that depended on the tariff and was different on different things.

A. I don't remember that question.

Q. Didn't I ask you the very question, what proportion of the through rate you got for the car after it left the end of your line and before it arrived at its destination?

A. I do not believe we get any; I am not an authority on that.

Q. You didn't say that depends on the tariffs between the two companies?

A. I said the proportion of the tariff was adjusted between the different traffic departments of the companies. It is something I don't know anything about though.

Q. Mr. Liggett, I believe you stated on direct examination that the higher the per diem charge the more the stimulation to get an early return of the car?

A. I think so; I believe it will have that effect.

Q. Why wasn't the per diem raised some years ago when you found this difficulty about getting the return of your cars?

A. Well simply because the different lines could not come to any agreement relative to per diem matters. Per diem is comparatively a new thing and in its experimental stages you might

say. However, it is becoming pretty well settled as a good policy to pursue, but the amount to be charged,—the different lines have always been in controversy as to how much it should be.

99 Q. If a railroad company should send a car to Stuttgart on your road, and should notify you at the same time the car was sent to return it immediately direct to them would you do it?

A. In some cases I would, yes.

Q. If you received those peremptory instructions, wouldn't you do so in all cases?

A. No sir, I would not.

Q. Why.

A. Well because other lines are not treating us in that way now. I would be more than glad to do it if other lines would do the same thing. The situation now is that we haven't got anything like enough equipment to take care of our business. They are holding our cars to take care of their local business. Now, when we get their cars we are naturally forced to do the same thing, or else let our industries on our line suffer, our local industries. We would take that foreign car and use it in our local business the same as they are doing ours, but when we got ready to return it home we would try to return it to the owner.

Q. It seems to be a game of hog eat hog isn't it?

A. That is about what it is, pretty near that, and I am sorry to see it.

Q. That is a common arrangement and custom of railroad companies?

A. That is the condition that we are in.

Q. Did you ever receive a demand of that kind for a car to be returned direct?

A. I expect there is not a day in the world that we don't get 100 special requisitions to return 100 different cars home.

Q. Have you received any demand or notice with a car shipped you to return that car direct?

A. We often have those notices.

Q. Do you ever send those notices?

A. Yes, we often send them too. We have written 100

100 letters a day, special letters, requesting equipment returned, and I expect I have gotten that many.

Q. If you notify a railroad company to return a car to you and they fail to do so, are not they responsible for it?

A. What kind of a notice do you refer to? A special request or notice of penalty, or what kind of notice.

Q. I mean this, if the I. C. had ten of your cars and you demanded them to send them back, and they didn't do it, wouldn't you have your rights against them?

A. We ask them. I expect especially demand of them 10 or 15 every month.

Q. Have you ever brought suit of any kind against any railroad corporation for failing or refusing to return cars to you?

A. No sir.

Q. Never have brought such a suit?

A. No sir; never have; we demand cars returned in several different ways; for instance, when they have had our car twenty days, in order to try to force that car home we serve a penalty notice on them; we are very particular to get them to them on the 20th day, the earliest day we can serve it on them.

Q. When they get that notice on the 20th day they turn it over to another railroad company?

A. That is what they usually do.

Q. And you don't get any per diem until the 20th day?

A. We don't get it until the 20th day.

Q. And they turn it over to another railroad company?

A. That is about the size of it; unfortunately we don't get very many of those dollars; but we would a good deal rather get the car if we could get it.

Q. Mr. Liggett, under the present system and this present good management, I want to ask you if you will be able to supply
101 the demands of your shippers whenever there is a shortage of cars somewhere else which preys upon your cars?

A. That is a pretty hard question. We are in hopes that with the increased per diem during the next summer season that we will have practically all of our cars on hand when the busy season strikes us, and that at least with what foreign cars we will have in addition to our own that we will have our full equipment. This with the additional cars which we propose to build I believe should run us through next year without any serious shortage. Of course that is simply a matter of conjecture, but that is the way it looks to me now, but it may not work out so.

Q. Why do you call your road an originating road? Freight originating here?

A. Yes.

Q. Your road being what is called an originating road, isn't it a fact that whenever there is a shortage in the east or the north that you are unable to get your cars back, and therefore, you will not be able to supply the demands of your shippers, no matter how many cars you have?

A. Unless we have enough stored to protect that shortage.

Q. How many cars Mr. Liggett would it have required in the fall of 1905 to have supplied the demands of all of your shippers, provided you had those cars in addition to what you already had, and provided these additional cars were kept by you on your own line. Would 1,000 have been sufficient?

A. You mean to have filled all orders?

Q. Yes, and these additional cars had been kept on your line?

A. I think if we had had 10,000 cars on the line there wouldn't have been a car shortage on the line, if we could have kept 10,000 on the line during the busy season.

Q. How many did you keep on the line during the busy season?

A. 7,000 to 7,500.

102 Q. In other words, if you had had 2,500 more on the line you could have supplied all your shippers?

A. If we could have kept them; but you will remember that it would have taken a good many more than 2,500 to have kept 2,500.

Q. You are not familiar are you with the Grand Prairie and the amount of hay produced there?

A. No. I know they have been calling on us for a lot of cars.

Q. You don't know how much hay was produced in any year?

A. No sir, I know they raise a great deal of hay.

Q. You don't know whether there was any unusual hay crop there in 1905 or not?

A. No I couldn't say.

Q. You don't know whether there was any greater demand for hay cars in 1905 than in 1904 or 1903 do you?

A. No I couldn't tell you that.

Q. You don't know whether there was any more demand for any certain cars in 1905 than in 1904 or '03?

A. No.

Q. You couldn't state if there were any more cars demanded in the fall of 1905 at Stuttgart than there had been theretofore in the usual course of business?

A. No I couldn't state that.

Q. If in the spring of 1905 you had ordered cars of the factories, how long would it have taken them to have been delivered?

A. In the spring of 1905.

Q. Yes.

A. I don't really know; I didn't carry on the correspondence with the builders. It generally takes about thirty or sixty days to build a car. We used to get cars in that time but I don't believe we could get them in that time now. We used to get cars in three or four months.

Q. You stated that the other railroads didn't return cars
103 to you and stated why. Do you know of your own knowledge why they didn't

A. Yes sir.

Q. How do you know that?

A. Because their officers have told me so.

Q. Now Mr. Liggett, isn't it a fact that the principal material shipped out of Arkansas on your line is raw materal such as lumber, cotton and hay. Aren't those the principal products?

A. Well yes sir.

Q. And that the things shipped in are -early all manufactured products, groceries, household goods, emigrant outfits and things of that kind. Now, if that is true, how can you say that this is what is called an originating line, that there is more freight shipped out of here than elsewhere. As a matter of fact, isn't there more freight shipped in than there is shipped out?

A. As an illustration, the loads that we deliver connections exceed those we receive thirty or forty per cent. In other words, we load that many more cars on our line, we originate it; we originate on our line more than the loaded cars that come to us, consequently, unless these other lines deliver us empty cars in addition to the

loads to equalize the equipment our equipment must necessarily grow less and less.

Q. Mr. Liggett, you referred to this per diem charge that accrues for time cars are off of your line. That is a mere custom, there is no formal contract or anything of that kind, it rests on usage?

A. Well there is an agreement, that is, we have what we call the American Railway Association, an association representing I presume ninety per cent. of the railroads of the country, who have formed an association known as the American Railway Association, as association of managing authorities of all the lines, the head authorities of the lines you might say. They promulgate rules.

Q. Here is what I am getting at. The St. Louis South-
104 western Railway Co. is a corporation organized under the laws of Missouri. Has that railroad made any contract with regard to its cars off its lines?

A. Except through the American Railway Association. That is a rule of the American Railway Assn. and we, as a member of that association, have to be governed by the rule, or else get out of the association.

Q. You have no formal contract then?

A. No formal contract.

By Mr. Edw. Pettit:

Q. You say the increase in the last three or four years in your box cars was 3040?

A. Yes sir, bran new cars.

Q. Now you say the total increase was 5,000. How do you figure that? These rebuilt cars don't increase the hauling capacity?

A. They were cars that were condemned, laying idle, worn out.

Q. When they were rebuilt it didn't make you any greater number of cars, just kept the same number you had before?

A. That is practically so.

Q. Then so far as box cars is concerned, all of the increase in your hauling facilities for the last three or four years has been 3040 cars?

A. We had some coal and stock cars.

Q. But they don't help so much in the transportation of merchandise such as was offered to you at Stuttgart; you don't load hay in coal cars?

A. We haul our company coal in them, when left us the box cars that had been in that business to haul your hay.

Q. Isn't it a fact that you haul your company coal and frequently other people's coal in other cars?

A. When we don't have coal cars.

105 Q. And you are frequently out of coal cars?

A. Sometimes.

Q. And you also haul railroad ties in your box cars?

A. Sometimes.

Q. And that decreases your capacity to haul other people's goods that need a roof, such as hay and stock?

A. Certainly.

Q. Do you know whether or not during the months of October, November and December 1905 and January 1906 you used box cars for that purpose?

A. I expect we did to some extent.

Q. And also your ties, which can be hauled in open cars can't they, in coal cars?

A. If you have them.

Q. They don't cost so much as a box car?

A. No, and they are much cheaper to handle.

Q. Do you call it good management of a railroad to use a box car in handling railroad ties and coal?

A. Well it depends on circumstances, if you have to have the coal and haven't got the coal cars, you can't run trains without coal.

Q. Then it becomes an expensive car, costing about $1,000, when a car costing half of that would answer the same purpose?

A. Coal cars cost more than that.

Q. About what does a coal car cost?

A. About $650.00.

Q. Then your rolling stock wasn't really increased by the repair of those 1500 cars?

A. It was increased in this, that when they were rebuilt they increased the capacity, built a larger car.

Q. You said on direct examination that 2,000 cars wouldn't have prevented a shortage, if you had 2,000 new cars?

106 A. I don't think I said that; I think you will find it expressed a little different from that.

Q. You said if you had them they would do for a while until they loaded them up once or twice and the other companies got them, and then you would still have your shortage?

A. It would have relieved us to that extent.

Q. And then on cross examination you said if you could keep on the line 2500 you could do the business without any shortage?

A. If we could keep them.

Q. You have eight cars to the mile,—if you had 2500 more you would have about ten?

A. Yes sir.

Q. Isn't that about what standard roads have? Isn't that about what it takes to the mile?

A. No sir.

Q. What railroad companies according to your statement here have ten cars to the mile?

A. All the coal carrying roads.

Q. You say it is not practical or possible to get cars in a legal way, and yet you have never tried to get them in that way. Will you please explain to the jury how you know it is not practical or possible for you to get them and you have not tried to do it?

A. I am not a legal authority and I can't understand how we could chase them all over the country.

Q. Now as a matter of fact hasn't the Cotton Belt just trusted that to the Association to handle the business and make the rules?

A. They have made the rules governing the inte-change of cars.

Q. Your company has just simply left it to them and had very little to say about it?

A. We have had a whole lot to say about that.

Q. In the last three years you have raised the rate from 20 to 25 cents a day?

107 A. Yes sir.

Q. That has been largely the result of your efforts to satisfy your patrons; isn't that all the change that has been made in the rating?

A. I have got a bundle of correspondence and documents in my satchel that I bundled up hurriedly that will show you what efforts we did make. I would like to submit it to you if you wish to see it.

Q. Is that bundle of papers and telegrams any larger than the bundle of papers and telegrams you get from people on the line asking for cars, who are suffering?

A. No sir, they are all very voluminous.

Q. You say that other lines have had possession of some of your cars for two or three years. How many cars have you had that belong to other lines for three years?

A. None.

Q. How many have you had for two years?

A. None.

Q. How many have you had for one year?

A. None.

Q. Don't you think that the management of other roads are doing more for their patrons than you are doing for yours?

A. You musn't understand that that car has been on one road; it has probably been on fifty roads.

Q. You say there has been a remarkable increase in the prosperity of the country, I understand you to mean that the increase of the prosperity of the country is greater than the prosperity of your road and facilities that you have to transport it; that your facilities have not grown with the prosperity of the country?

A. It is probably true that we didn't anticipate quite so large an increase in the business; that may be true in a manner of our company; all the others are beginning to realize it; we have realized it pretty well when we bought eight cars to a mile of road to

108 take care of, spent three million dollars approximately for equipment in the last three years.

Q. That three million dollars was dollars that the people paid you for hauling freight?

Objected to and question withdrawn.

Q. If you had furnished cars,—wouldn't your earnings have been greater if you had furnished the cars?

A. Certainly they would; we would have been glad to furnish the cars if we could. We were just as anxious to increase our earnings as we possibly could be.

Q. Have you been connected with the management of the road in this capacity ever since 1903?

A. As Superintendent of Transportation, yes sir.

Q. Wasn't there a complaint from this same point in regard to shortage in 1903, and didn't the Railroad Commission cite your railroad company to appear before them at Stuttgart?

A. We have had complaints every year.

Q. And you had knowledge of the shortage from time to time?

A. Yes sir.

Q. And yet you haven't increased your facitities only 3040 cars in the last four years, box cars?

A. That is about right.

Q. Haven't you let your cars get off of your line on foreign lines just the same since 1903 since that big shortage as you did before that time?

A. We have endeavored to keep them at home but we were not able to do so and handle the business.

Q. You say in the neighborhood of 6,000 cars have been out on other lines for the past three years, five thousand and something, and then six thousand and something, and then six thousand and something. Then you had about half that many foreign cars on your road?

A. I gave you the figures.

109 Q. About 2500 or 2600?

A. Yes sir.

Q. That 2500 or 2600 foreign cars took the place of 2500 or 2600 of your cars that were away?

A. Yes sir.

Q. Then as a matter of fact you only had 2500 or 2600 away all the time, really just half of the number you have testified to?

A. 2500 to 3000.

Q. This per cent of your cars on foreign lines, ought really to be just half of what you have stated, because these others were exchanged?

A. These foreign cars, 2500, were really exchanged for them.

Q. For 2500 of your cars, and you really only had half of the 58 per cent. on foreign lines, instead of 58 per cent. as testified to. You recollect your testimony on that point do you?

A. I want to give you the exact figures.

Q. What is the per cent that you stated was on foreign lines?

A. We had as high as 64 per cent.

Q. On your direct examination you stated 58%?

A. 58 one month, 60 and 64.

Q. After you deduct the foreign cars that you had on your line then the percentage wouldn't only be about half of that would it?

A. We would have the same per cent. of our own cars off the line, just the same, but that same statement shows the number of foreign cars that we had on the line, right in the same line, so that you can see just exactly what the situation in regard to our equipment was.

Q. Then the real per cent. of the cars wasn't 58 or 60, but half of that, since you had that many foreign cars?

A. They answered the same purpose, yes sir, as long as we had so many foreign cars.

Q. You said in your direct testimony that corn is a very
110 large product that you are called on to carry. Isn't it a fact that there is more corn shipped into Arkansas than is shipped out on your line?

A. I don't recollect mentioning corn in my testimony.

Q. Didn't you say that was a large article of shipment in your direct testimony?

A. If I did I don't recollect it.

Q. Can you see any improvement in the situation, so far as the foreign situation is concerned, since you charge the rate from 20 to 25 cents?

A. Since last July.

Q. Yes.

A. No sir.

Q. You don't see that that has helped it any?

A. I don't see that it has helped it.

Q. In your opinion, would the raising of that rate to $1 a day induce the cars to be sent back?

A. It would contribute to do it without a doubt. We would willingly pay $1 a day for the use of the cars now though if we could get them.

Q. And yet you have several thousand cars out that you are getting 25 cts a day for?

A. Yes sir.

Q. And that is in your opinion a good arrangement for the patrons of your road.

A. That is a position we are simply forced into.

Redirect examination by Mr. WOOLDRIDGE:

Q. You are paying the same rate on the cars you are using?

A. Yes sir, but the trouble is this, if you will let me explain. The per diem rate of 25 cts a day doesn't pay for your investment in the car, for its depreciation and maintenance; it costs you more
111 than 25 cts a day to own a car. I figure 40 cts, some 35 cts and some 37½ cts. It costs anywhere from 35 cts to 40 cts a day to own a freight car. It is evident then that for every car you have got away from home in use on a foreign line that you are losing the difference between the 25 cts a day which you receive and the 35 cts or 40 cts which it actually costs you to own and maintain a car. In other words, if you have got 1,000 cars away from home you are losing $100 to $150 a day, just for the privilege of owning these cars. Now, if the per diem is put beyond the point that will pay for the depreciation and maintenance of your car, then there will be an incentive to car building, because you can own cars and get proper returns for the use of them without having to lose money on them. For that reason, I believe that the increase of per diem is going to stimulate car building generally all over the country and make cars more plentiful. And another result,—during the dull season there isn't anybody going to keep your car and pay you fifty cents a day for it if they can turn it home when they have got no use for it, and the result will

be that during the dull season the c lines who were not able to get their cars home before will get their cars thrown right back home on to them and they will go into the next busy season with a full quota of equipment of their own, and probably a good many foreign cars besides. We have tried during the last two years to go into the busy season with a full quota of our equipment and more if we could get it, and although we began as early as the month of July to accumulate it we were not able to get it; we did all the begging and applying that we could.

Q. I believe you say lumber is one of your principal products?

A. About 65 per cent. of our tonnage is lumber.

Q. That lumber is shipped off, it is not shipped in?

A. There is lumber shipped locally, but the majority goes off of our line.

Q. You don't have lumber shipped from other sections on to your line?

112 A. That is a very small per cent.

Q. I want you to get into the minds of this jury that 2500 additional cars,—if you had these 2500 additional cars you could have taken care of the business. I understood you to say that you were short 2500 or 3000 a day; that you had in actual service 7,000 or 7,500?

A. We had cars at home and foreign cars on the line, something like 7,000 cars.

Q. Wouldn't you have to have this additional equipment to make you 10,000 cars each day, to take care of the business?

A. What we mean is 10,000 on the line every day.

Q. If you had these 2500 one day you would have loaded them and they would have gotten off the line too?

A. It would have helped our patrons that much.

Q. But that wouldn't have kept you 10,000 each day on the line?

A. No, we couldn't keep them.

Q. You would have to get your quota back to keep your equipment at 10,000 a day?

A. That is just for the busy season; we don't need that many during the dull season; if we could get 7,000 during the dull season.

Q. The percentage of your cars away from home during the busy season is much greater than during the summer season? They send your cars home?

A. They haven't been doing it as well as we wanted them to, but still they send a great many home.

Q. In a car shortage like this or even in 1905, would $1.00 a day penalty bring your cars home?

A. It might bring some.

Q. But the lines that are short of cars,—wouldn't they prefer to pay you $1.00 a day than to send your cars home?

A. I know we would be glad to pay $1.00.

113 Cross-examination by Mr. Edw. Pettit:

Q. You speak about lumber,—that is usually shipped in open cars isn't it?

A. No sir, they will ship it on anything now, shipping even dressed lumber on open cars.

Q. And you say it costs about 35cts a day to own a box car, how do you figure that?

A. Well the original investment is say $950.00. Six per cent interest or say five per cent interest would cost you $45.00 interest a year. Depreciation is six per cent,—a car depreciates six per cent a year; and the repairs and maintenance of the car amount to fully as much. Now when our cars are away from home your understand what repairs are made on them they bill on us for those repairs,—we pay that.

Q. If you load a car of freight from here to be shipped from here to say Portland, Ore. or Kansas City, the Cotton Belt would get some credit for the use of its car after it left Jonesboro on the Frisco.

A. Yes, it gets regular per diem; when we deliver that car to the Frisco at Jonesboro the Frisco pays us for the use of the car.

Q. Doesn't the Cotton Belt get its proportion of the through freight?

A. I don't think so; I think they simply get their proportion of the rate up to Jonesboro and nothing else, but, as I said before, I am not an authority on rates and traffic matters.

The defendant offered no further evidence.

114 Thereupon, the plaintiff introduced the following testimony:

Philip Reinsch Deposition.

PHILLIP REINSCH, being first sworn, testified as follows:

Examined by Mr. CLYDE PETTIT:

Q. You are the Phillip Reinsch referred to in the complaint?

A. Yes sir.

Q. How many cars did you make requisition for from the defendant during the months of October, November and December 1905 and January 1906?

A. One hundred and ninety-eight.

Defendant objected to testimony regarding any requisitions made prior to October 30, 1905. Objection sustained.

Q. The number of cars—198—is the number of cars ordered after what date, after October 30th?

A. If I remember right it was orders for October, November, December and January.

Q. Were any of these 198 cars ordered before October 30?

A. I think not.

Q. I will ask you if in the middle of January 1906 you made complaint to the Railroad Commission about the failure of the railroad company to furnish the 51 cars referred to in the complaint in this case?

A. Yes sir.

The question and answer were objected to. Objection overruled Defendant excepted.

Q. Had they then furnished any of these cars?
A. No sir.

Cross-examination by Mr. WOOLDRIDGE:

Q. Did you get the cars that the agent testified about you getting in November, December and January?
115 A. I don't remember what the agent testified to.
Q. Weren't you here when he testified?
A. I heard part of it and part of it I didn't.
Q. You did get cars in November, December and January did you not?
A. I suppose that we got some cars.
Q. You don't know whether these cars, any of them, were furnished on the orders that you made or not do you Mr. Reinsch?
A. Well I know that I ordered 198 cars during that period.
Q. You don't remember how many cars you did get during that period?
A. I don't remember, if any.
Q. But you did get a lot of cars?
A. Not a lot, a very few if I got any. I wouldn't have gone to the Railroad Commission if I had gotten cars.
Q. These 198 cars that you ordered,—were they not duplicate orders,—you didn't have produce for 198 cars did you?
A. I surely had or I wouldn't have placed orders.
Q. You didn't make any duplicate orders?
A. I keep duplicates myself; I take an order to the agent and send a duplicate to the Railroad Commission.
Q. Did you have 198 cars of stuff in that time?
A. Yes sir.
Q. In what did it consist? Was it all hay?
A. Surely; I don't remember placing any orders for anything else but hay cars. I have shipped some cattle but never had any trouble getting cattle cars in there.

Redirect-examination by Mr. PETTIT:

Q. Mr. Reinsch, the last of these 198 were ordered on what date?
A. January 20th.
Q. None of these 198 were ordered after January 20th?
116 A. No sir.

Cross-examination by Mr. WOOLDRIDGE:

Q. How many of these cars Mr. Reinsch were for shipments outside of the State?
A. I don't remember.
Q. Wasn't there a large lot of them ordered for interstate shipments?
A. Not a large part of them, the biggest part was the State.
Q. Where was your market for your hay at that time principally?
A. The most of it was right in the State at that time.

Q. You don't know how many were for interstate shipments.
A. I don't remember.
Q. Were there any at all?
A. There might have been a few, I wouldn't say.

At 10:00 o'clock P. M. court was adjourned until 8:00 o'clock A. M. on Monday following, the 19th day of November, 1906, at which time the trial of this cause was resumed and the following proceedings were had therein, to-wit:

117 *V. Holmes' Deposition.*

Mr. V. HOLMES, being first sworn, testified.

Examination by Mr. PETTIT:

Q. You reside at Stuttgart?
A. Yes sir.
Q. Your business is what?
A. Shipping hay and produce.
Q. How long have you lived at Stuttgart?
A. Seven years.
Q. I will ask you if you are familiar with the condition of the car market in Stuttgart and have been?
A. Yes sir, that is my business, shipping hay in car lots.
Q. State whether there were as many cars furnished in the fall of 1905 and January 1906 as there had been during the same months in 1904?
A. No sir, there was not.

Mr. Wooldridge for the defendant objected to any testimony that does not relate to the time in which the cars as alleged in the complaint were ordered; whereupon, the question was withdrawn.

Q. From October 30th 1905 to January 20th 1906, were there as many cars furnished as during the same months in 1904?

Mr. Wooldridge for defendant again objected on the grounds that conditions in 1904 might have been different from 1905-06, and that the testimony is therefore irrelevant. Objection overruled, to which defendant excepted.

Q. Were there as many furnished during that time as in 1904?
A. No sir, there were not.
Q. Were there as many cars furnished during that time in 1905-06 as in the same period in 1903-04?
—. No sir.

Mr. Wooldridge for defendant urged the same objection and
118 moved that the evidence be excluded. Objection and motion were overruled, to which he excepted.

Q. Mr. Holmes, illustrate the difference in the number of cars furnished in that period in 1905 and the same period in 1904.

Same objection by defendant urged. Overruled.

Q. How many did you get that year?

A. I have a statement here of the same periods of time for the period of 1903—from December 20th, 1903 to January 23rd, 1904—we received 60 cars, that is, myself; from December 20th, 1904 to January 23rd, 1905, I received 41 cars for shipment; and from December 20th, 1905 to January 23rd, 1906, we received 28 cars. And taking the past month, going back the same period of time—from October 18th to November 18th—in 1904—that was the past month—we received 34 cars in that year; in 1905 from October 18th to November 18th we received 14 cars; and the present year, from October 18th to November 18th, 1906, I received two, and have had in requisitions ever since the middle of September from all the way from 15 to 35 or 40 cars.

Mr. Wooldridge for defendant objected to and moved to exclude the witness's answer as incompetent and irrelevant. The objection and motion were overruled, to which defendant excepted.

Q. Mr. Holmes, you got your due share of cars at those times?

A. I suppose I did yes sir; I tried to get them and have no reason to suppose that I didn't.

Defendant raised some objection and moved to exclude the answer, but was overruled, and excepted.

Q. Did you during the time you got those cars need other cars, or were those all you asked for?

A. No sir, they were not all I asked for; I never have been able to fill all my orders during this period of time since I have been in business.

119 Q. During those periods of time you were trying to get as many cars as you could?

A. Yes sir.

Q. And made requisitions for as many as you needed?

A. Yes sir.

Q. I will ask you if the total number of cars furnished all shippers at Stuttgart in those years and periods compare proportionately to the number of cars furnished you approximately?

A. Why, you mean my share?

Q. In other words, if you got your proportion, and you got less cars, I will ask you if the total number of cars furnished were proportionately less?

A. Yes sir, I didn't get any more than my share of cars and I am not the largest shipper there.

Q. Were there any more shippers in the fall of 1905 than in 1904 and 1903?

A. No sir, there has been no material change, the same number of large shippers; of course there is small shippers come and go, but the leading hay dealers have been there since I have been in town, since I have been there—seven years.

By the COURT:

Q. You mean the bulk is done by the same persons?

A. By the same individuals.
Q. The bulk of the town's shipping business has been about the same since the time you have mentioned?
A. Yes, sir.

Mr. Wooldridge, for the defendant, objected to and moved to exclude the whole of the testimony of this witness as incompetent and irrelevant; he was overruled and duly excepted.

By PLAINTIFF'S COUNSEL:

Q. Was there any unusual or unprecedented or unexpected
120 demand for cars in Stuttgart from October 30th, 1905, until January 20th 1906?
A. No sir.

Mr. Wooldridge for the defendant objected. Objection overruled. Exception duly saved.

Q. Was there any unusual or unexpected or unprecedented demand for cars along the line of defendant company during that same time?
A. I don't understand the question.
Q. Was there any unusual, unexpected or unprecedented demand for cars during this period of time along the line of defendant company?
A. No sir only just the same as always has been; we have always been short of cars during that period.
Q. Was there a shortage of cars in Stuttgart during the fall of 1902 and 1903?
A. Yes sir.
Q. Was there in 1904?
A. Yes sir.
Q. The same shortage of cars in 1905?
A. There was a shortage of cars in every year during this period of time, I don't say the same shortage; but there are not competent facilities to handle the situation during that period of time.

Mr. Wooldridge for the defendant again urged his objections and moved to exclude the testimony of this witness. His objection and motion were overruled, to which he at the time excepted.

Cross-examination by Mr. WOOLDRIDGE:

Q. You have reference to the place of Stuttgart do you and no other? That is the only place you know about?
A. It is the only place I do business, I ship from.
Q. It is the only place you undertake to testify about?
121 A. I mean along the hay points from which we ship hay; I don't mean Stuttgart exclusively; I mean points on the prairie.
Q. Your answer then relates to hay shippers?
A. Yes sir.
Q. You don't deal in any other products?
A. Yes sir, I deal in coal; run a coal yard there.

Q. You don't undertake to say to the jury that you know the condition of the system all along the St. Louis Southwestern from Texas to Missouri do you?

A. No sir.

Q. Do you know how many cars you received in November 1905?

A. No sir—I have my books here, I can look it up; these items here don't cover that period of time but I have my books.

Q. You don't know then without examining?

A. No sir, but I can look it up.

Q. You don't know in December 1905 nor January 1906 do you?

A. Yes sir, I think I do.

Q. How many did you receive in December 1905?

A. December 20th to January 23rd.

Q. How many do you say you received?

A. Why from December 20th to January 23rd, 1906, that is the only data I have without referring to my books—I just took one month for three years back and that month was December 20th to January 23rd—and December 20th 1905 to January 23rd 1906 I received 28 cars, but I can give you any month you wish.

Q. You say there was usually a shortage of cars during that season each year?

A. Yes sir, ever since I have been at Stuttgart.

Q. Is that the busy season of the year?

A. It would be if we could get the cars.

Q. Is that the season that the heavy shipments are made?

A. No sir, the shipments commence about the middle of
122 September and will last until the middle of May if we had the ability to ship stuff there.

Q. When is the cotton product moved? Isn't that moved during the fall months?

A. Why as fast as it can be moved; it is offered for sale during that time.

Q. Those are the months it is offered to the railroad for movement?

A. Yes sir.

Redirect examination by Mr. PETTIT:

Q. I will ask you if it isn't a fact that you asked for more cars during all this time in 1905-06 than you did during the same period of time in 1903-04. In other words, from October 30th to January 1905-06 did you ask for more cars than you had for the same time in 1904-1905?

A. I couldn't tell the exact figures, but it would stand to reason that I did because I wasn't getting as many.

Q. Your business was just as large?

A. Yes, larger, for the reason that I wasn't getting as many cars and I have a regular trade.

Q. I will ask you if during this period of time in 1905-06 the defendant was hauling coal and cross-ties in its box cars?

A. Yes sir, to a certain extent they were.

Q. I will ask you whether or not you are not familiar with the

general condition in a general way of the industries along the line of this defendant company?

A. Why over certain portions of it I am, not over the entire system but from here,—our local shipments of stuff extend from Texarkana to Jonesboro.

Q. And you are familiar with the car situation and the business between those two points in a general way?

A. That is a kind of question that I don't believe I would
123 like to answer that way. I know it in regard to my business; I know it is impossible to get shipping facilities, but I don't know anything about other interests in any other way.

Q. Is there any other way for shippers to get hay out of Stuttgart except over the line of the defendant railway company?

A. No sir.

Q. That is the only railroad there?

A. Yes sir.

Q. I will ask you the effect on the hay business if the hay is not moved by the railroad company before the middle of January in each year?

Defendant objected and question was withdrawn.

Q. I will ask you if your business during the periods referred to necessitated your being at defendant's station in Stuttgart frequently and around it on its tracks and among its cars?

A. Yes sir.

Q. And whether from that means of knowledge you gained your information as to cars furnished and the general condition of the car market?

A. Yes sir.

Mr. Wooldridge for the defendant moved to exclude all the foregoing questions and answers as incompetent and irrevelant. Motion overruled, to which the defendant duly excepted.

Cross-examination by Mr. WOOLDRIDGE:

Q. Your orders included shipments for places both within the State and without the State, did they,—that you refer to?

A. Why I have the duplicate requisitions here. Have you any objections to my looking at it?

Q. Don't you know?

A. I wouldn't like to state positively whether they were or
124 not; I might have had a few orders for Shreveport but the bulk of my trade is Texarkana and Jonesboro. I might have had a few for Shreveport but that is the only market outside of the State that I have.

This was all the evidence introduced in the case, either by plaintiff or defendant.

125 "EXHIBIT A" TO TESTIMONY OF A. B. LIGGETT.

Statement Showing Freight Equipment Per Mile of Various Roads.

Road.	Miles.	Equipment.	Cars per mile.
St. L. S. W.	1332	10569	8.0
K. C. S.	762	7488	9.8
Tex. & Pac.	1833	9190	5.0
Frisco	5086	29041	5.7
I. M. & S.	2356	13970	5.9
Mo. Pac. Sys.	6237	46111	7.3
I. & G. N.	1104	3911	3.5
M. K. & T.	3043	17738	5.8
H. & T. C.	690	3087	4.5
S. A. & A. P.	724	1800	2.5
C. & A.	970	9779	10.
Big Four	2290	23262	10.
T. St. L. & W.	450	2867	6.4
Wab.	2493	18871	7.6
R. I. Sys.	6705	39086	5.8

Exhibit "A" to A. B. Liggett's Deposition.

126 "EXHIBIT B" TO TESTIMONY OF A. B. LIGGETT.

St. Louis Southwestern Railway Co.

Statement of Cars Short During Months of November and December, 1905, and January, 1906.

Date.	Nov., '05.	Dec., '05.	Jan., '05.
1st	505	.....	559
2nd	481	818	678
3rd	605	666	524
4th	430	657	546
5th	.....	690	549
6th	563	729	635
7th	530	823	.....
8th	575	956	544
9th	584	788	535
10th	634	.....	654
11th	611	794	593
12th	.....	601	634
13th	474	897	646
14th	588	662	.....
15th	573	727	541
16th	691	658	681
17th	808	739	636
18th	808	.....	643

Date.	Nov., '05.	Dec., '05.	Jan., '06.
19th	.....	607	747
20th	766	620	720
21st	817	632	.....
22nd	662	615	693
23rd	601	628	707
24th	725	.....	645
25th	713	.....	705
26th	.....	565	716
27th	758	566	768
28th	820	634	.....
29th	833	536	835
30th	No report.	689	689
31st	.....	.....	1000
Total	16155	16631	17823
Average	646	693	660

Exhibit "B" to A. B. Liggett's Deposition.

Plaintiff's Instructions.

127 Thereupon the plaintiff requested the court to give the following instructions to the jury:

GENTLEMEN OF THE JURY:

1.

You are instructed that this is a suit by the State of Arkansas against the St. Louis Southwestern Railway Company to recover a penalty from defendant for an alleged failure or refusal to furnish cars referred to in the complaint of Phillip Reinsch, and if you find for the plaintiff, you will assess the amount of penalty to be recovered at any sum (not less than $500.00 and not exceeding $1950.00, the amount sued for), which you may deem proper and right under the evidence in this case.

2.

You are instructed that it is the duty of a common carrier to furnish reasonable facilities of transportation to all shippers at every station who in the regular and expected course of business offer their products for transportation; and if you find from the evidence that defendant violated this duty by failing or refusing to furnish cars referred to in the complaint to Phillip Reinsch without undue and unreasonable delay, you will find for the plaintiff, unless you further find that defendant is excused for such failure, if any, under the instructions of this court.

3.

All the instructions shall be considered together as the law governing this case.

To the giving of each of said instructions Nos. 1, 2 and 3, asked by the plaintiff, the defendant objected, but they and each of them were given over such objections of the defendant, to which the defendant at the time save- its several, separate exceptions.

128 The plaintiff requested the court to further instruct the jury as follows:

4.

This suit is to recover a penalty for an alleged failure to furnish 51 cars to Phillip Reinsch. You are instructed that you could not assess a penalty against defendant in this proceeding for failure, if any, to furnish any cars to Phillip Reinsch except the 51 referred to, nor for a failure to furnish any cars whatever to V. Holmes.

The court offered to give the foregoing instruction #4, but upon objection of defendant and by reason thereof the court refused to give the said instruction No. 4.

Instruction by the Court.

The court of its own motion then instructed the jury as follows:

1.

If you find from the evidence that the defendant company expected an annual increase of shipping business on its line of road during the fall of 1905 and month of January 1906, and had sufficient cars and rolling stock of its own to supply said expected increase in business, but failed to use reasonable care and diligence in furnishing said cars to said Phillip Reinsch as alleged, then the defendant is not excused under the law and you should find for the plaintiff.

To the giving of said instruction No. 1 by the court the defendant objected and at the time saved its exceptions.

Defendant's Instructions.

Thereupon, the defendant requested the court to instruct the jury as follows:

I.

129 The jury are instructed to return a verdict for the defendant Company.

II.

The court instructs you that the Railroad Commission had no authority under the statutes of this State to establish and adopt the rule or order, designated in the complaint as number 305, and the

same was not binding upon defendant, and the complaint in this case being based upon a violation of said order by the defendant, said defendant is not liable for the penalty sued for and your verdict should be for the defendant.

III.

The court instructs you that no allowance or provision having been made by the Railroad Commission in said order or rule 305, mentioned in the complaint herein, for any contingency whatever that might reasonably happen that would unavoidably prevent defendant company from, at all times, furnishing all the cars that might be ordered by a shipper, but on the other hand said order requiring defendant to furnish all cars that might be ordered, absolutely and without any conditions whatever, the same is unreasonable and is not binding on defendant, and your verdict should be for defendant.

IV.

The jury are instructed that all persons and corporations applying to have freight transported over any railway line operated in this State have an equal right to have it transported in the order of the application. No railway company can legally give undue preference to any one shipper or class of shippers; in other words, railways must give all shippers equal facilities for shipping their products. And if you find from the evidence in this case that the defendant was unable to furnish the said Phillip Reinsch, mentioned in the complaint, all the cars, or any number thereof, as
130 ordered for the purpose of shipping hay as set out in said complaint, on account and by reason of an unfor-seen and unexpected accumulation of freight on its line of road, without giving him undue preference over other shippers on the line of road owned by defendant and operated by it, then your verdict must be for the defendant.

V.

Section 6804, Kirby's Digest, requiring all persons or corporations engaged in the transportation of property to furnish without delay sufficient facilities for the receiving, carriage and delivery of freight does not require that railway companies shall provide in advance for an unprecedented and unfor-seen amount of freight, nor can the Railroad Commission of this State make such requirement.

VI.

The jury are instructed that while railroad companies are under legal obligations to furnish cars for the transportation of freight upon their lines of road, they are not bound under the law to provide transportation for unfor-seen and unexpected quantities of freight tendered them upon their line of roads. In such cases they are only required to use reasonable diligence in the furnishing of cars without discrimination. So if you find from the evidence that the defendant exercised reasonable diligence to furnish the cars ordered of it by the said Reinsch, and defendant was unable to do

so on account of an unexpected congested state of traffic on its line, without discriminating against other shippers similarly situated, then your verdict should be for the defendant.

VII.

If you believe from the evidence that the defendant has sufficient cars and was properly equipped to supply the usual and ordinary demand upon it for same, but at the time the cars were
131 ordered by said Reinsch there was an unusual demand for cars which could not have been reasonably anticipated, and that defendant's cars, or a large portion thereof, were unavoidably out of reach at the time of the congested state of traffic and the ordering of the cars by the said Reinsch, and the defendant could not by the exercise of reasonable diligence get its cars returned or procure other cars sufficient to have enabled defendant to supply the said Reinsch with all the cars as ordered without discriminating against other shippers similarly situated, then you should find for defendant.

VIII.

If you believe from the evidence that the defendant exercised reasonable diligence to provide itself with sufficent cars to accommodate the anticipated increased demands upon it, but that it was unavoidably prevented from doing so at the time the said Reinsch ordered the cars of defendant as set out in the complaint, but that defendant did furnish the said Reinsch his equitable pro rata of cars and he was not discriminated against, then defendant is not liable for the penalty sued for and you should so find.

IX.

If you believe from the evidence that the defendant company had sufficient equipment to transport and carry all freight tendered to it at the time the cars were ordered in this case, but that a large part of its cars had been loaded by shippers along its line and forwarded by said company to its connecting lines to be carried to places of consignment and that said company was unable to get its own cars returned to it by its connecting carriers, or to get from such connecting carriers the pro rata of cars from each connecting carrier in lieu of the car- belonging to defendant according to the manner and custom between railway companies, as testified to in this case, and by reason thereof defendant was unable to furnish the said
132 Reinsch with all the cars ordered as shown in this case, but that he did receive his proportionate part as compared with other and similar shippers, then defendant company is not liable for the penalty sued for in this case, and your verdict should be for the defendant.

X.

If you believe from the evidence that the managers of defendant company, anticipating an increased business for the fall and winter of 1905 and 1906, did, prior, thereto, endeavor to obtain additional cars for handling of such anticipated increased business, but that

they were unavoidably prevented from obtaining such additional cars, and by reason of the heavy traffic defendant could not furnish the said Reinsch with all the cars as ordered, but gave him his proportionate part, then plaintiff cannot recover in this case and your verdict should be for defendant.

XI.

The court instructs you that under the laws of the United States governing common carriers engaged in interstate traffic, they can, as to such traffic, make no discrimination between shippers in the furnishing of cars and transportation facilities, and when for any unavoidable cause which could not have been reasonably foreseen or expected, a railway company is unable to furnish interstate shippers all the cars required, it is the duty of such company to make an equitable distribution of its cars to such shippers, and if you believe from the evidence in this case that a compliance with order number 305 as made by the Arkansas Railroad Commission, in requiring defendant company to furnish all the cars ordered by shippers for State shipments, would have compelled defendant to have discriminated against interstate shippers in furnishing them cars,
133 and such would have been the case in furnishing to Reinsch all the cars ordered in this case, the said order 305 is an unjust discrimination against interstate traffic, is a burden upon interstate commerce and is in conflict with the interstate commerce law and is void, and your verdict should be for defendant.

XII.

The court instructs you as a matter of law that under the evidence in this case a compliance with order 305, made by the Arkansas Railroad Commission, by defendant company in furnishing all the cars to Reinsch as ordered, would have compelled defendant company to have discriminated against interstate shippers, and in such case said order would not be binding upon defendant and said defendant is not liable for the penalty sued for in this case and you should so find.

XIII.

If you find from the evidence in this case that if defendant was compelled to furnish all the cars ordered by State shippers for State shipments under order 305 of the Arkansas Railroad Commission, and that in doing so defendant would have been compelled to have discriminated against interstate shippers in the furnishing of cars, then in such cases said order is in conflict with the United States statutes governing common carriers engaged in interstate commerce traffic and is void, and your verdict should be for defendant.

XIV.

If you believe from the evidence there was an unusual congested state of traffic which caused a car shortage by defendant company at the time the cars were ordered by Reinsch as alleged in this

case and that defendant could not have furnished all the cars ordered without discriminating against interstate shippers, then your verdict should be for defendant.

134

XV.

The court instructs you that the complaint in this case is for a penalty as provided by the statutes of Arkansas for violating the order 305 of the Arkansas Railroad Commission, as set out in said complaint, for the refusal of defendant company to furnish to Reinsch the cars ordered by him as provided by said order. The court instructs you that there being no provision in said order that would excuse the defendant railway company from furnishing the cars ordered against any contingency that might arise, and said order providing that defendant and all other railway companies doing business in Arkansas should furnish all cars ordered without any conditions whatever, that a suit based on a violation of said order by plaintiff to recover the penalty provided by the statute of this State in such cases, is a taking of defendant's property without due process of law and is a denial to it of an equal protection of the law and in conflict with section one of article fourteen of the amendment to the Constitution of the United States, and said order 305 of said Railroad Commission is void and plaintiff is not entitled to recover in this case.

XVI.

The jury are instructed that in determining this case they can only consider the failure to furnish cars by defendant ordered for State shipments and that they have nothing to do in considering this case with the failure of the defendant company to furnish all the cars ordered for shipments without the State.

The court gave said instructions numbered 4, 5, 6, 7, and 16, but refused to give instructions numbered 1, 2, 3, 8, 9, 10, 11, 12, 13, 14 and 15 requested by the defendant, or each of them, and to the refusal of the court to give the said instructions so refused, and each of them, the defendant then and there saved its several

135 separate exceptions.

The court thereupon modified said instruction No. 10 requested by the defendant and offered to give the same, as modified, as follows:

X as Modified.

If you believe from the evidence that the managers of defendant company anticipating an increased business for the fall and winter of 1905 and 1906, did, within reasonable time prior thereto, endeavor to obtain additional cars for the handling of such anticipated increased business, but that they were unavoidably prevented from obtaining such additional cars, and by reason of the said increase in business, if any, and defendant's said inability to procure the additional cars, defendant could not furnish the said Reinsch with all the cars as ordered, but gave him his proportionate part,

then plaintiff cannot recover in this case and your verdict should be for defendant.

Defendant objected to the giving of said instruction No. 10 as modified and the same was therefore not given.

After argument of counsel the jury retired to consider of their verdict, and in due time returned into court the following verdict, to-wit:

"We, the jury, find for the plaintiff and assess the penalty at one thousand three hundred and seventy five dollars.

H. E. HANKS, *Foreman.*"

Judgment was entered accordingly.

136 Thereafter, on the same day, to-wit: the 19th day of November 1906, the defendant filed in open court its motion for a new trial, in words and figures as follows, to-wit:

"Motion for a New Trial."

Comes the defendant by its attorney and moves the court for a new trial herein, and for cause, states:

1. That the court erred in overruling the demurrer of defendant filed to the complaint herein.

2. Because the verdict of the jury is contrary to the evidence.

3. Because the verdict of the jury is contrary to law.

4. Because the verdict of the jury is contrary to the law and the evidence.

5. Because the court erred in giving to the jury, over the objections of the defendant, instructions Nos. 1, 2 and 3 as asked by the plaintiff, to the giving of each of which the defendant at the time severally and separately excepted.

6. Because the court erred in giving to the jury instruction No. 1 given by the court on its own motion, to the giving of which the defendant at the time excepted.

7. Because the court erred in refusing to give instructions Nos. 1, 2, 3, 8, 9, 10, 11, 12, 13, 14 and 15 as requested by defendant, to the refusal of giving each of said instructions, as asked by the defendant, the defendant at the time severally and separately excepted.

8. Because the court erred in refusing to exclude from the jury, as requested by the defendant, that part of the testimony of the witness, V. Holmes, relating to the ordering of cars from defendant other than those ordered as shown and mentioned in the complaint.

9. Because the court erred in not excluding from the jury, as requested by defendant, the following questions and answers thereto propounded to the witness, V. Holmes, to-wit:

137 "Q. From October 30th 1905 until January 20th 1906 were there as many (cars) furnished as during the same time in 1904? Were there as many furnished as during that period in 1904?

A. No sir, there was not.

Q. Were there as many furnished during that time in 1905 and 1906 as in the same period in 1903 and '04?

A. No sir."

10. Because the court erred in refusing to exclude from the consideration of the jury the following question and answer thereto propounded to the witness, V. Holmes, to-wit:

"Q. How many did you get that year?

A. I have a statement here of the same periods of time for 1903,—from December 20th 1903 to January 23rd 1904 we received 60 cars, that is myself. From December 20th 1904 to January 23rd 1905 I received 41 cars for shipment; and from December 20th 1905 to January 23rd 1906 we received 28 cars; and taking the past month,—going back the same period of time,—from October 18th to November 18th,—1904,—that was the past month,—we received 34 cars in that time; in 1905 from October 18th to November 18th we received 14 cars; and the present year from October 18th to November 18th I received 2; and have had requisitions ever since the middle of September all the way from 15 to 35 or 40 cars."

11. Because the court erred in refusing to exclude from the jury question 5 and all other questions and answers thereto propounded to the witness, V. Holmes, on direct examination, and all questions propounded to said witness on redirect examination by counsel for plaintiff, because defendant says the same was irrelevant and incompetent.

12. Because the court erred in refusing to exclude from the jury all that part of the testimony of Philip Reinsch relating to the ordering of cars other than those mentioned and set out in plaintiff's complaint.

138 Wherefore, defendant prays that the judgment herein be set aside and the defendant granted a motion for a new trial herein.

BRIDGES & WOOLDRIDGE,
Attorneys for Defendant.

Upon hearing the said motion for a new trial the court overruled the same and refused the defendant a new trial of the cause, to which the defendant then and there saved its several separate exceptions and prayed an appeal to the Supreme Court, which was granted, and the defendant was allowed sixty days in which to prepare and file its bill of exceptions.

139 *Judge's Signature.*

Now comes the defendant, St. Louis Southwestern Railway Company, by its attorneys, Bridges & Wooldridge, and presents to the court this its bill of exceptions, containing all of the evidence introduced, all instructions asked, given and refused and all proceedings had in this cause, and asks that the same be by the court, examined, approved, signed and ordered filed and made a part of the record in this cause, which is hereby accordingly done.

Done and signed by me, the Judge of the Seventeenth Judicial

District of Arkansas, at DeValls Bluff, Ark., on the 24th day of December, 1906.

EUGENE LANKFORD, *Judge.*

Filed in my office on this the 14th day of Jan. 1907.
C. P. BALL, *Clerk.*

140 *Supersedeas Bond.*

In the Arkansas County Circuit Court.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Appeal Bond.

Whereas, the appellant, St. Louis Southwestern Railway Company, has taken an appeal from the judgment of the Arkansas Circuit Court, rendered at its November term, 1906, against the St. Louis Southwestern Railway Company in favor of appellee, State of Arkansas, for the sum of one thousand three hundred and seventy-five dollars, and the costs, and appellant desires to supersede said judgment, now W. D. Hearn and E. C. Howell, sureties, hereby covenant with the said appellee that the said appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal; or, in the event of the failure of the appellant to prosecute said appeal to a final judgment in the Supreme Court; or, if said appeal shall for any cause be dismissed, that said sureties shall pay to the appellee all costs and damages, and shall perform the judgment of the Court appealed from; also that said appeal shall be prosecuted without delay, also that they will satisfy and perform the judgment or order appealed from in case it should be affirmed and any order or judgment which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment and costs.

Witness our hands this the 12th day of January, 1907.

ST. LOUIS SOUTHWESTERN RY. CO.,
By BRIDGES & WOOLDRIDGE, *Att'ys.*
E. C. HOWELL.
W. D. HEARN.

Filed in my office and approved January 14th, 1907.
C. P. BALL, *Clerk.*

141 *Fee Bill.*

R. F. Parker, Sheriff	$1.10
C. B. Ball, Clerk	7.65
Jury Tax	3.00
Transcript (Pd. by dft.)	38.00
	$49.75

142 *Clerk's Certificate.*

STATE OF ARKANSAS,
County of Arkansas:

I, C. P. Ball, clerk of the circuit court of Arkansas County, Arkansas, do hereby certify that the foregoing one hundred and fifty-two pages of typewritten matter constitute a true and correct and compared copy of all papers filed and the record of all orders in a case lately pending in said court, wherein the State of Arkansas was plaintiff, and the St. Louis Southwestern Railway Company was defendant, as the same appeared from the original papers and records of said court now remaining in my office.

In testimony whereof, I hereunto set my hand and official seal at my office in DeWitt, Arkansas County, Arkansas, this the 15th day of January, 1907.

[SEAL.] C. P. BALL, *Clerk.*

143 *Filing Transcript.*

No. 6582.

Eugene Lankford, J.

ST. L. S. W. RY. CO.
vs.
ARKANSAS.

STATE OF ARKANSAS:

Transcript.

Filed Jany. 18th, 1906.

P. D. ENGLISH, *Clerk.*

144 *Supreme Court Orders.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of May, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 1st day of July, 1908, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Arkansas Circuit Court.

This cause being regularly called, come the parties thereto by their Attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and by the Court taken under advisement.

145 STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of May, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 22nd day of July, 1907, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY CO., Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Arkansas Circuit Court.

This cause now under submission, involving a constitutional question, is passed by the Court for additional argument, and it is ordered that said cause be continued until after the summer recess, with leave granted to argue the same orally on a date to be hereafter fixed.

146 STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of May, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 30th day of September, 1907, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY CO., Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Arkansas Circuit Court.

This cause wherein the Court has heretofore granted leave to argue the same orally on date to be agreed upon, is now by consent of parties set for oral argument on November 25th, A. D. 1907.

147 STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, that at a term of the Supreme Court of the State of Akansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 25th day of November, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY CO., Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Arkansas Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys and the same is argued orally by the attorneys for the appellant and appellee, submitted upon the transcript of the record and the briefs filed, and is by the court taken under advisement.

148 *Judgment Supreme Court.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 16th day of December, 1907, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY CO., Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Arkansas Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Arkansas County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all her costs in this Court in this cause expended and have execution thereof.

149 *Opinion Supreme Court.*

In the Supreme Court of Arkansas, Dec. 16, 1907.

No. 50.

ST. L. SO. WEST'N RY. CO.
v.
STATE OF ARKANSAS.

Opinion.

HILL, C. J.:

Phillip Reinsch, a dealer in baled hay at Stuttgart, made demand on appellant Railroad Company for cars during the season running from October 30th, 1905, to January 20th, 1906, and was furnished some cars; but the railroad company failed to furnish him within those dates 51 cars, which were properly demanded for various shipments to be made to different points within the State of Arkansas.

Reinsch filed complaint before the Railroad Commission and on a hearing the Commission found that the company had violated Sec. 10 and 18 of the Act of March 11th, which are secs. 6803 and 6813 of Kirby's Digest; and a rule of the Commission, effective August 5th, 1907, known as order 305 (which will be found in the statement of facts); and directed the Prosecuting Attorney to bring suit pursuant to Sec. 6813 Kirby's Digest.

This suit resulted; and, the finding of the Commission making a *prima facie* case against the company under sec. 6814 Kirby's Digest the Company assumed the burden of excusing itself for failing to furnish the cars in question, the failure was acknowledged.

The first question urged is that the Commission did not have authority to make said order 305. Aside from its effect in this case the question is academic, because in Sec. 3 of the Act of May 28th, 1907, and Sec. 22 of the Act of April 19th, 1907, express authority may be found for rules on the subject. Nor is the order important in this case; there was no failure to furnish cars within the
150 five days therein fixed, but a failure to furnish at all the cars in question. Sec. 6803 Kirby's Digest (expressly named in the suit as one violated) requires the carrier to receive, load, unload, transfer, store and deliver all property offered for shipment, at charges not greater than those named in posted schedules; this would undoubtedly include the duty of furnishing cars on proper demand. Sec. 6804 also requires the furnishing of cars; and sec. 6808 renders a violation of these requirements a cause of action for damages by the injured shipper. Sec. 6813 renders the violation of any of these requirements (and also legal orders of the Commission) cause for incurring the penalty therein sued for. These statutes are merely declaratory of common law rights (Ry. *v.* Clay Gin Co. 77 Ark. 357), for which these statutory remedies are provided.

The counsel attack as unreasonable and void order 305 for the reason stated by the Supreme Court of the United States in Ry. *v.*

Mayes, 201 U. S. 321, wherein a statute of Texas, somewhat similar to this order, was under review. As the order is unnecessary to the maintenance of this suit, as the suit also predicated upon statutes which cover every question in it, a discussion of it would be out of place.

The only other question requiring consideration is whether the undisputed evidence introduced by appellant presented a sufficient excuse for the failure to furnish the cars. The question has given the Court much concern, and the cause has been resubmitted for argument upon it; and after the benefit of additional arguments and briefs, the Court has reached its conclusion slowly.

It will be found in the Reporter's statement that the evidence of appellant (and its evidence was all there was upon this subject) showed that during the time of the failure to furnish the cars in question the railroad company had sufficient equipment to meet the demands of its traffic, that there was on its line no unusual or extraordinary or unprecedented rush of business; but with its own car equipment on its line there was no time when any industry
151 would have suffered from want of cars. In fact, the appellant was shown to have a larger car equipment than the average freight carrying road; and the failure to furnish cars was wholly due to an inability to regain its cars which were sent to other roads carrying freight from its own line. Over 90% of the railroads of the United States belong to the American Railway Association, which promulgates rules for a system of interchange of cars among its members. The appellant is one of its members and governed by its rules. The appellant is an originating line, originating about 70% of its traffic and receiving about 30%.

To illustrate its situation: during the month of November, 1905 it had in revenue service 9517 cars, of which it averaged daily 3982 in use on its own lines, 5525 off its line and 2519 foreign cars in use. In other words, a daily balance of exchange of 1473 cars was against it, and its shortage in cars was only about 650 per day. Unless there was an efficient car service exchange and return, it is apparent that an originating road would soon be depleted of its equipment, especially in times of great traffic in the East, as there was within the time in question.

In ordinary circumstances, the proper average time for the return of a car is 22 days; during the time in question it was three months or more. The rules of the American Ry. Assn. provide a charge of 25cts a day for 30 days; after 30 days, and after ten days notice to the road holding it, then $1 per day was charged. This 25 cents charge was not for revenue but was fixed as a basis of settlement; the charge after 30 days of $1 a day for each car was a penalty to hurry its return.

The heavy business in the last two or three years before the time in question caused serious drains on appellant and other originating lines. About two years before this time a per diem of 20 cents per day per car was put in, and it was increased to 25 cents and after this time in question in this suit, and owing to the se-
152 rious effect on originating lines during the season in question, it was increased to 50 cents per day. The system has proved

ineffective to return cars for the past two or three years. In times of dull traffic, appellant's cars would be sent back to its lines to stop this charge, and in the short season of moving the crops over the country, when the demand was great everywhere and traffic congested in the East, then the foreign roads preferred paying the per diem to returning the cars. It was cheaper to non-originating roads to pay this small charge than to own more equipment.

The general superintendent of appellant says: "In a congested state of traffic, the per diem charge would not have any effect in getting the cars returned, for other roads would rather pay twenty-five cents and keep the cars than to return them." This same official says that it was customary in order to avoid the penalty, to shift the cars within thirty days to another line where it can remain for another thirty days without other penalty than the 25 cents per diem. It is one of the rules of interchange of cars that a foreign car must be loaded and moved only in the direction of home; and had this rule been observed, appellant would not have had a shortage, but it was habitually disregarded ever since the traffic in the last few years grew heavy.

The evidence indisputably establishes that it is a benefit to the shipping public to interchange cars and not to refuse to send cars off the line. Broadly stated, this evidence presents this issue: Railroad companies who interchange cars with appellant here failed in their duty to appellant in keeping, instead of returning, its cars, and appellant correspondingly failed in its duty to its shippers, including the complainant in this action; shall the shipper or the carrier suffer for this default?

It is unquestionably good for the public that the railroads of the United States have a system of interchange of cars, instead of each road hauling to its terminic only, and thereby force reloading
153 and reshipment. The inconvenience and expense of such a system would at — condemn it as failing to meet public requirements. It is unquestionably the policy of both State and Federal legislation to facilitate if not require an interchange of cars. The most recent illustration of this policy is found in Sec. 17 of the Act of April 19th, 1907 (Acts 1907, p. 463).

For one railroad company to be an Ishmalite among its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England, and their fruits to the North, and their lumber and coal to the four quarters of the Union without change from consignor to consignee.

The beneficient and useful purpose of car service associations formed to facilitate the interchange and movement of cars is well stated in Ry. *v.* George, 82 Miss. 710; and the same court in a though-ful and well considered decision held that a car service association was not a combination in restraint of trade and obnoxious to the anti-trust statute. Yazoo & M. Ry. *v.* Searles, 68 L. R. A., 715.

The Kentucky court says what the carriers may lawfully do for themselves they may do through a common agent and the reason-

able rules of a car service association are enforceable. Ky. Wagon Mfg. *v.* Ry. 32 S. W. 596.

The result of these and other decisions as summed up in an excellent text book is that these associations are lawful and their rules and regulations, when reasonable, will be upheld. 2 Hutchinson on Carriers, 3rd Ed. sec. 861.

Mr. Elliott says that such associations formed for the purpose of making and enforcing reasonable regulations to facilitate business and secure the prompt loading, unloading and return of cars cannot be held illegal upon the ground that the constituent companies by becoming members surrenders their corporate functions and control to the association. 4 Elliott on Railroads, sec. 1568.

154 The right of carriers to engage in such associations and to enforce reasonable rules is well stated by the Virginia court in N. W. Ry. *v.* Adams, 22 L. R. A. 530; but in sustaining the reasonableness of the rule in that case the court said: "The railroad company as a common carrier, is bound to furnish cars for transportation of freight; and they must have control over their cars in order to perform their duties to the public."

The Kentucky court, in Ry. Co. *v.* Reed, 10 Ky. L. Rep. 1020, referred to in note to 43 L. R. A. 227, said: "To allow that it (the carrier) may be excused for failure to furnish cars by showing that it allowed its cars to be taken to other roads beyond the power to control them would be to allow that it might fail to supply itself with sufficient facilities to transact its business on its own lines * * * Means not under the control of the carrier are just as hurtful as means not provided."

The evidence here shows that the appellant company lost control over a majority of its cars knowing that the rules for their return were insufficient to insure their return. Experience for the last two or three years had demonstrated that the rules for return of cars were insufficient. At the time the cars were needed to move the crops, they were in the East earning less than interest and wear; and when they could be spared by appellant and probably bring in a small revenue from demurrage charges elsewhere, they were returned home.

The system of interchange of cars which appellant suffered to prevail as controlling its car service, had broken down completely; its rules were habitually disregarded, and the return of cars within a reasonable time not produced; and yet it is offered as the excuse for a failure to comply with its duties to the public. This system caused the railroad company to lose control of its equipment and a continuance of its inefficient service is an abdication of its corporate functions to a voluntary association irresponsible for losses to its patrons and

155 probably irresponsive to the just demands of the appellant company itself. It may be better for the appellant to suffer these ills than to sail under a black flag and refuse to send its cars beyond its line; that is not a question for the court. Until the appellant carrier shows reasonable rules and regulations for the interchange of cars, it cannot avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here

shown have proved unreasonable and inefficient before this default occurred.

Judgment affirmed.

156 *Order Supreme Court.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 6th day of January, 1908, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal From Arkansas Circuit Court.

Comes the appellant by attorneys and prays the Court for time in which to prepare and file briefs in support of its petition for rehearing, heretofore filed, which motion is granted, and said appellant is granted time until January 27th, inst., in which to file such briefs.

157 *Petition for Rehearing.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 27th day of January, 1908, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal From Arkansas Circuit Court.

The petition for rehearing being called, is submitted on the briefs filed and is by the Court taken under advisement.

158 In the Supreme Court of Arkansas.

No. 6582.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Petition for Rehearing.

Comes the appellant, St. Louis Southwestern Railway Company, by attorneys, and moves the court that it be granted a rehearing herein, and prays that the judgment of the court affirming the judgment of the lower court in this cause be set aside and that the judgment of the lower court entered herein be reversed and for cause says:

1st. That the court erred in holding it was not necessary to decide the validity of order number 305 of the Arkansas Railroad Commission.

2nd. The court erred in not holding that the complaint was based wholly upon said order number 305, and in holding that the suit and judgment could be maintained aside from said order.

3rd. The court erred in holding that the complaint and judgment could be sustained under sections 6803 and 6804, Kirby's Digest, for the reason that section 6803 provides that a carrier "shall receive, load, unload, transport, store and deliver .... at and for charges not greater than those specified in such schedule as may at that time be in force," which is the qualifying clause and has no reference to furnishing of cars, and for the reason that section 6804 provides that carriers should "furnish without discrimination or delay, equal and sufficient facilities, which should be construed to mean that carriers could not discriminate between shippers in the furnishing of facilities

159 but not an absolute requirement to furnish same under all conditions, and the complaint in this cause being brought for a violation by appellant of said order number 305 of the Arkansas Railroad Commission, the judgment of the lower court could not be based on said sections.

4th. The court erred in holding, under the undisputed evidence, as proven in this cause, that owing to the general congested state of traffic throughout the United States, appellant could not get its own cars returned from its connecting carriers and could not get other cars in lieu of its cars from its connecting carriers, that this was not a valid defense to this suit when in view of the fact that this court in its opinion justifies the car service association and holds that they are valid and beneficial both to shipper and carrier alike; that the policy of the law is, if not in fact required, to sanction the interchange of cars by railway companies and that for one railroad to be an Ishmalite would operate disastrously to its shippers.

5th. The court erred in holding that the rules and regulations of the American Car Association were unreasonable and in particu-

larly in holding that the facts as proven in this case relating thereto were not a defense to this action.

6th. The court erred in not holding that the Federal questions presented in appellant's answer, and as proven in this cause was a defense to this suit.

7th. The court erred in not holding that order number 305 of the Arkansas Railroad Commission requiring appellant to furnish cars as set out in said order was repugnant to and in conflict with the commerce clause of the Constitution and laws of the United States, and that said order under the undisputed proof of appellant in this cause would operate against and directly burden interstate commerce and would cause a preference to state as against interstate business.

8th. The court erred in not holding that order No. 305 of the Arkansas Railroad Commission was in conflict with section
160 one of article fourteen of the Amendment to the Constitution of the United States.

9th. Because sections 6803 and 6804, of Kirby's Digest, as construed by the opinion in this case is in conflict with and in violation of section 8, article one of the Constitution of the United States, and especially that part thereof which reserves to Congress the right to regulate commerce among the several states, and in conflict with and in violation of the Act of Congress entitled "An Act to Regulate Interstate Commerce" approved February 4, 1887, and amendments thereof and supplements thereto, and because the law of Arkansas, as construed by the said opinion, is a direct attempt at the regulation of interstate commerce.

We, as attorneys for appellant, certify that the motion for a rehearing herein is made and filed in good faith and we ask that the court give us a reasonable time to file a written brief in support of this motion.

S. H. WEST,
BRIDGES, WOOLDRIDGE & GANTT,
Attorneys for Appellant.

(Endorsed on back:) In the Supreme Court of Arkansas. St. Louis Southwestern Railway Co. *vs.* State of Arkansas. Petition for rehearing. Filed Dec. 30, 1907. P. D. English, Clerk. By W. P. Sadler, D. C.

161 *Rehearing Denied.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 24th of February, 1908, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY CO., Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Arkansas Circuit Court.

Being fully advised, the petition for rehearing filed herein, is by the Court denied.

162 *Mandate Stayed.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 2nd day of March, 1908, a day of said term:

ST. LOUIS SOUTHWESTERN RAILWAY CO., Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Arkansas Circuit Court.

Comes the appellant by attorneys and files its petition praying that the issuance of mandate and of execution herein be withheld for two weeks, pending its application for a writ of error to take this cause into the Supreme Court of the United States. Said motion is granted, and the Clerk is directed to stay the issuance of the mandate and of execution as prayed.

163 *Certificate of Clerk Sup. Court to Transcript.*

STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, Clerk of the Supreme Court of the State of Arkansas, hereby certify that the foregoing — pages contain a full, true, and complete transcript of the record and proceedings in said court in the cause therein stated, with all things concerning the same.

In testimony whereof I hereto set my hand as Clerk and affix the seal of said Court, at my office, in Little Rock, Arkansas, this — day of March, A. D. 1908.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH, *Clerk.*

164 In the Supreme Court of Arkansas.

No. 6582.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Petition for Writ of Error.

Assignment of Errors.

Considering itself aggrieved by the final decision of the Supreme Court of the state of Arkansas, in rendering judgment against it, in the above-entitled cause, the appellant and defendant below hereby prays a writ of error from said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

And the said St. Louis Southwestern Railway Company assigns the following errors in the records and proceedings of the said cause:

1. The supreme court of the state of Arkansas erred in holding and deciding that order No. 305, promulgated by the Railroad Commission of the state of Arkansas, on the 5th day of August, 1905, in the following words, viz:

Office of the Railroad Commission of Arkansas.

Order No. 305.

Effective August 5th, 1905.

165 It is ordered by the Commission that its rules be so amended that when a shipper makes written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within five days from 7 o'clock a. m. the day following such application. Provided, that when a shipper orders a car or cars and does not use the same, he shall pay demurrage for such time as he holds the car or cars, at the rate of $1.00 per car per day, dating from 7 a. m. after car or cars are placed.

Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than five days notice thereof, computing from 7 o'clock a. m. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

When freight in car loads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of

lading therefor, and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than fifty miles per day of twenty-four hours, computing from 7 o'clock a. m. the second day following receipt of shipment. Provided, that in computing the time of freight in transit, there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or re-handling freight is involved.

The period during which the movement of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time
166 allowed in this rule, and counted as additional free time.

The commission reserves the right on its own motion to suspend the operation of these rules, or any one or more of them, in whole or in part, whenever it shall appear that justice demands such action, and the Commission will, upon complaint, hear and act upon applications for a like suspension.

Nothing in these rules shall apply to shipment of live stock and perishable freight where the rules of this Commission or the laws of the State require the more prompt furnishing of cars or movement of freight than provided for by these rules.

By order of the Commission.

Little Rock, Ark., July 19, 1905.

W. E. FLOYD, *Secretary.*

was not a burden on interstate commerce and in refusing to hold that said order was a burden on interstate commerce; and in refusing to hold that said order was in conflict with the provisions of the Act of Congress entitled, "An Act to Regulate Interstate Commerce," passed on February 4, 1887, and Acts of Congress amendatory thereof.

2. The supreme court of Arkansas erred in holding and deciding that order No. 305, promulgated by the said Railroad Commission of the State of Arkansas, as aforesaid, was valid. The validity of said order was denied and drawn in question by the appellant and defendant below on the ground that it was repugnant to the constitution and laws of the United States and in contravention thereof.

The said errors are more particularly set forth, as follows:

The supreme court of Arkansas erred in holding and deciding:—

167 1st. That the said order No. 305 did not create a burden on interstate commerce, and was not in conflict with the provisions of the Acts of Congress passed for the purpose of regulating interstate commerce.

2. The court erred in refusing to hold and decide that said order No. 305, promulgated by the Railroad Commission of the State of Arkansas, as aforesaid, was repugnant to and in conflict with the Commerce Clause of the Constitution of the United States, and the laws passed by Congress in pursuance thereof, and in refusing to hold and decide that said order would operate upon and directly

burden interstate commerce, and would cause a preference to state, as against interstate business.

3. Said court erred in not holding that said order No. 305, promulgated by the Railroad Commission of said state, as aforesaid, was in conflict with section one of article 14, of the Amendments to the Constitution of the United States.

4. Sections 6803 and 6804 of Kirby's Digest of the laws of the State of Arkansas, as same are construed by the court, in its judgment and decision in said cause, are in conflict with and in violation of section eight, article one of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several states, and are in conflict with, and in violation of the act of Congress entitled, "An act to Regulate Interstate Commerce," approved February 4th, 1887, and amendments thereof, and supplements thereto.

And said court erred in so holding and construing said statute, and in enforcing the same, because said statute, as construed
168 by said court in its aforesaid ruling, is in conflict with, and in violation of the aforesaid provisions of the Constitution of the United States, and Acts of Congress passed in pursuance thereof.

5. Said court erred in holding and deciding that the lower court, in which said cause was tried, committed no error in its refusal to give the following instruction, asked by this petitioner, at the trial of said cause, viz.:

"If you find from the evidence in this case that if defendant was compelled to furnish all the cars ordered by state shippers for state shipments under order 305 of the Arkansas Railroad Commission, and that in doing so defendant would have been compelled to have discriminated against interstate shippers in the furnishing of cars, then in such cases said order is in conflict with the United States statutes governing common carriers engaged in interstate commerce and traffic and is void, and your verdict should be for defendant."

and in approving and affirming the ruling and action of the lower court in such refusal.

6. Said court in refusing to hold that the lower court, in which said cause was tried, erred in refusing to give to the jury the following instruction which was requested by petitioner herein, at the trial of said cause, viz:

"The Court instructs you that there being no provision in said order, (referring to order No. 305), that would excuse the defendant railway company from furnishing the cars ordered against any contingency that might arise, and said order providing that defendant and all other railway companies doing business in Arkansas should furnish all cars ordered without any conditions whatever, that a suit based on a violation of said order by plaintiff to recover the penalty provided by the statute of this state in such cases,
169 is a taking of defendant's property without due process of law and is a denial to it of an equal protection of the law and in conflict with section one of article fourteen of the amendments to the Constitution of the United States, and said order 305

of said Railroad Commission is void and plaintiff is not entitled to recover in this case."

and in approving and affirming the ruling and decision of the lower court in refusing to give said instruction to the jury at the trial of said cause.

For which errors, the St. Louis Southwestern Railway Company prays that the said judgment and decision of the supreme court of Arkansas, dated the 16th day of December 1907, and the judgment and decision of said court overruling appellant's petition for a rehearing dated Feb'y 24th, 1908, be reversed, and a judgment rendered in favor of said St. Louis Southwestern Railway Company, the defendant in said proceeding, and for costs.

SAMUEL H. WEST,
FRANK G. BRIDGES,
WILLIAM T. WOOLDRIDGE,
NICHOLAS J. GANTT,
Attorneys for Petitioner.

STATE OF ARKANSAS,
Supreme Court:

Let the writ of error issue upon the execution of a bond by the St. Louis Southwestern Railway Company to the State of Arkansas in the sum of $3000.00; when such bond is approved, it shall act as a supersedeas. Dated this 12th day of March, 1908.

B. B. BATTLE,
Acting Chief Justice of the Supreme Court of the State of Arkansas; the Regular Chief Justice Being Absent from the State of Arkansas.

170 [Endorsed:] No. 6582. In the Supreme Court of Arkansas. St. Louis Southwestern Railway Company, Appellant, *v.* State of Arkansas, Appellee. Petition for Writ of Error. Assignment of Errors. Filed March 12, 1908. P. D. English, Clerk, by W. P. Sadler, D. C. Bridges, Wooldridge & Gantt, Attorneys for Appellant.

171 Copy.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation Plaintiff in Error,

v.

STATE OF ARKANSAS, Defendant in Error.

Bond.

Know all Men by these Presents:

That we, St. Louis Southwestern Railway Company, as principal, and Chas. McKee, and Gordon N. Peay, as sureties, are held and firmly bound unto the State of Arkansas, in the sum of Three Thousand dollars to be paid to the said State, to which payment,

well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this the 12th day of March, 1908.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise in full force and effect.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By BRIDGES, WOOLDRIDGE & GANTT,
Attorneys.

CHAS. McKEE.
GORDON N. PEAY.

STATE OF ARKANSAS,
Pulaski County:

Chas. McKee and Gordon N. Peay, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens
172 of the State of Arkansas, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Three Thousand dollars over and above all debts, liabilities and exemptions.

GORDON N PEAY.
CHAS. McKEE.

Subscribed and sworn to before me this the 12th day of March, 1908.

[SEAL.] J. F. WILLS,
Notary Public.

My commission expires May 28, 1911.

Bond approved and to operate as a supersedeas.

B. B. BATTLE,
Acting Chief Justice of the Supreme Court of Arkansas, the Chief Justice Being Absent from the State of Arkansas.

(Endorsed on back:) St. Louis Southwestern Railway Company, a corporation, Plaintiff in Error, *v.* State of Arkansas, Defendant in Error. Bond. Filed March 12, 1908. P. D. English, Clerk, by W. P. Sadler, D. C.

173 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between the St. Louis Southwestern Railway Company, a corporation, and the State of Arkansas, wherein was drawn in question the validity of a Statute of, or an authority exercised under, said State of Arkansas, on the ground of being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; a manifest error hath happened to the great damage of the said St. Louis Southwestern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court, may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 12th day of March, in the year of our Lord one thousand nine hundred and eight.

[The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.]

W. P. FEILD,
Clerk U. S. Circuit Court of the United States, Eastern District of Arkansas, Western Division,
By W. PRESLEY FEILD, *D. C.*

Allowed by

B. B. BATTLE,
Acting Chief Justice of the Supreme Court of the State of Arkansas, the Regular Chief Justice Being Absent from the State of Arkansas.

[Endorsed:] St. Louis Southwestern Railway Company *v.* State of Arkansas. Writ of Error. Filed March 12, 1908. P. D. English, Clerk, by W. P. Sadler, D. C.

174 *Citation.*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the St. Louis Southwestern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the acting Chief Justice of the Supreme Court of the State of Arkansas, this 12th day of March, 1908.

B. B. BATTLE,
Acting Chief Justice of the Supreme Court of Arkansas, the Chief Justice Being Absent from the State of Arkansas.

[Seal of the Supreme Court of Arkansas.]

Attest:

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By W. P. SADLER, *D. C.*

LITTLE ROCK, ARK., *March* 12, 1908.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

WILLIAM F. KIRBY,
Attorney for State of Arkansas.

[Endorsed:] Filed March 12, 1908. P. D. English, Clerk, by W. P. Sadler, D. C.

175 STATE OF ARKANSAS,
In the Supreme Court:

The original of petition for writ of error, assignment of errors and prayer for reversal, and copies of same were each filed with the Clerk of the Supreme Court of Arkansas, on March 12th 1908, and each marked.

Filed March 12, 1908.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court Arkansas.

176 STATE OF ARKANSAS,
In the Supreme Court:

The original of the foregoing supersedeas bond was lodged with the Clerk of the Supreme Court of the State of Arkansas on March 12, 1908, and the following endorsement made thereon:

Bond. Filed March 12, 1908.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court.

STATE OF ARKANSAS,
In the Supreme Court:

The original of the foregoing Writ of Error was lodged with the Clerk of the Supreme Court of Arkansas on March 12, 1908, and at the same time and place a copy thereof for the Defendant. The following endorsement was made upon said original writ and copy:

Writ of error. Filed March 12, 1908.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court Arkansas.

177 UNITED STATES OF AMERICA,
Supreme Court of Arkansas:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Little Rock, this March 12, 1908.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk of the Supreme Court of the State of Arkansas.

Costs of Suit.

Paid by Plaintiff in Error, viz:

Copying Transcript and proceedings in Supreme Court &c.	$51 00
8 Filings	2 00
2 Certificate- & Seals	1 00
34 Index	3 40
Marginal Notes	5 00
Total	$62 40

Attest:

P. D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 21,086. Arkansas supreme court. Term No. 111. St. Louis Southwestern Railway Company, plaintiff in error, *vs.* The State of Arkansas. Filed March 30th, 1908. File No. 21,086.

Office Supreme Court, U.
FILED.
DEC 4 1909
JAMES H. McKENNE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 111

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OF THE PLAINTIFF IN ERROR.

SAMUEL H. WEST,
FRANK G. BRIDGES,
WILLIAM T. WOOLDRIDGE,
NICHOLAS J. GANTT, JR.,
ROY F. BRITTON,

Attorneys for Plaintiff in Error.

(21,086.)

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I. Order No. 305 of the Railroad Commission of Arkansas, or Sections 6803 and 6804 of Kirby's Digest, as construed by the Supreme Court of Arkansas, being the necessary basis for this suit, and being, by their terms and as so construed, a burden on interstate commerce, there is a Federal question involved, and this court has jurisdiction 13

II. The order of the Railroad Commission of Arkansas, known as Order No. 305, and Sections 6803 and 6804 of Kirby's Digest, as construed by the Supreme Court of Arkansas, in this suit, are void as a regulation of interstate commerce ... 17

(1) A regulation of the instrumentalities of interstate commerce is a regulation of that commerce, and is repugnant to the commerce clause of the United States Constitution 17

(2) The order of the Railroad Commission and the statutes of Arkansas as applied to the facts in this case, impose a direct burden on interstate commerce 19

(3) The order and statutes are void because Congress has legislated with respect to their subject matter in the Act to Regulate Commerce, approved February 4, 1887, and Amendments thereto. 31

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 111

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS,
DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

I.

On July 19, 1905, the Railroad Commission of Arkansas made an order, known as Order No. 305, regulating the furnishing of cars by carriers to shippers. It was as follows:

> "It is ordered by the Commission that its rules be so amended that when a shipper makes written application to a railroad company for a car or cars,

to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within five days from 7 o'clock a. m. the day following such application. Provided, that when a shipper orders a car or cars and does not use the same, he shall pay demurrage for such time as he holds the car or cars, at the rate of $1.00 per car per day, dating from 7 o'clock a. m. after the car or cars are placed.

"Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than five days' notice thereof, computing from 7 o'clock a. m. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

"When freight in car loads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immedately receive the same for shipment, and issue bills of lading therefor, and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than fifty miles per day of twenty-four hours, computing from 7 o'clock a. m. the second day following receipt of shipment. Provided, that in computing the time of freight in transit, there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or rehandling freight is involved.

"The period during which the movement of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this rule, and counted as additional free time.

"The Commission reserves the right on its own motion to suspend the operation of these rules, or any one or more of them, in whole or in part, when-

ever it shall appear that justice demands such action, and the Commission will, upon complaint, hear and act upon application for a like suspension.

"Nothing in these rules shall apply to shipment of live stock and perishable freight where the rules of this Commission or the laws of the State require the more prompt furnishing of cars or movement of freight than provided for by these rules."

This became effective August 5, 1905. (Printed Transcript, page 2.)

II.

Philip Reinsch, a dealer in baled hay at Stuttgart, Arkansas, made written demand of the St. Louis Southwestern Railway Company, plaintiff in error and a common carrier whose line of railroad passes through Stuttgart, for fifty-one cars. His demands were made in accordance with Order No. 305 of the Railroad Commission of Arkansas, and stated that he intended to use the cars for shipping hay to various point in the State of Arkanas. (Printed Transcript, pages 2-3.) The cars were ordered as follows:

Oct. 30, 1905, 12 cars for shipment to Texarkana, Ark.
Oct. 30, 1905, 1 car for shipment to Hot Springs, Ark.
Oct. 30, 1905, 1 car for shipment to Anderson, Ark.
Nov. 20, 1905, 15 cars for shipment to Texarkana, Ark.
Dec. 12, 1905, 12 cars for shipment to Texarkana, Ark.
Jan. 20, 1906, 9 cars for shipment to Texarkana, Ark.
Jan. 20, 1906, 1 car for shipment to Hot Springs, Ark.
(Printed Transcript, pages 3-4.)

III.

Reinsch, during this time, had ordered from the plaintiff in error one hundred and ninety-eight cars, all

to be delivered within five days from the respective dates on which they were ordered. (Printed Trascript, page 71.) Of these fifty-one were not delivered. The cars not delivered were ordered for the shipment of baled hay to various points within the State of Arkansas, as shown above.

IV.

Upon complaint to the Railroad Commission of Arkansas, an order was made, known as Order No. 324, directing the Prosecuting Attorney of the Seventeenth Judicial District of the State of Arkansas to institute this suit in the Circuit Court of Arkansas County to recover a penalty from plaintiff in error. (Printed Transcript, pages 3-4.)

V.

At the time these cars were ordered, the following statute was in force in Arkansas (Kirby's Digest, Sections 6803, 6804):

> "Sec. 6803. All persons or corporations engaged in the transportation of passengers or property shall and are hereby required to keep posted up at every depot under the control of or in use by such person or corporation, in a conspicuous place therein, plainly and legibly printed schedules, which shall state: First, the different kinds and classes of property to be carried; second, the different places between which property shall be carried; third, the rate of freight or express charges for carriage between such places, and for all services connected with the transportation of such property, from its receipt until it is delivered or forwarded. Such schedules shall be posted for at least five days before the same shall go into effect, and the same shall

remain in force until another schedule shall, as aforesaid, be posted; and every person or corporation engaged, as aforesaid, shall receive, load, unload, transport, store and deliver to the consignee thereof any and all property offered for shipment, whether as freight or express matter, at and for charges not greater than those specified in such schedule as may at that time be in force, and shall, on demand, issue to shippers duplicate freight or express receipts, which shall state the class of freight shipped, the weight and charges. And all the provisions of this act shall apply to all property, and all the services in and about the transportation thereof, on one actually or substantially continuous carriage, or a part therof, and to the compensation therefor, whether the same is carried wholly on one railroad or partly on several railroads, and whether the services are performed, or compensation paid or received by or to one person or corporation alone or in connection with another, or other persons or corporations; provided that at such points where freight or express are subject to competition by water routes not controlled by this act nor complying with its provisions, the schedule herein provided for may be posted and go into immediate effect.

"Sec. 6804. It shall be unlawful for any person or corporation engaged alone or associated with others in the transportation of passengers or property by railroads in this State, as freight or express, directly or indirectly, to demand or receive from any person, firm, company or corporation any greater or less rate or amount of compensation than is demanded or received from any other person, firm, company or corporation for substantially similar and contemporaneous services, or to allow any person, firm, company or corporation, directly or indirectly, any rebate, drawback or other advantage in any form, or to make any preference in furnishing cars or motive power. And all persons or corporations engaged as aforesaid shall furnish, without discrimination or delay, equal and sufficient facili-

ties for the transportation of passengers, the receiving, loading and unloading, storing, carriage and delivery of all property of a like character carried by him, them or it; and shall perform, with equal expedition and at uniform rates, the same kind of service connected with the contemporaneous transportation thereof as aforesaid. And it shall be unlawful for any person or corporation engaged as aforesaid to enter into any contract or agreement, by changes of schedule, use of different cars, or any other means or device, with intent to delay or prevent the shipment of such property from being continuous from the place of shipment to the place of destination, whether carried on one or more railroads."

VI.

The complaint alleged the making of Order No. 305 by the Railroad Commission of Arkansas; that Philip Reinsch made written application for fifty-one cars for the shipment of hay to specified points in Arkansas; that said cars were to be furnished within five days from the respective dates on which they were ordered; that in violation of rule No. 305 of the Railroad Commission and its duty as a carrier, the defendant failed and refused to furnish said cars; that Reinsch complained to the Railroad Commission of Arkansas, charging the defendant with a violation of said Order No. 305; that, upon a hearing of this complaint, Order No. 327 was made, and this suit brought. (Printed Transcript, pages 1-5.)

The answer denies the authority of the Railroad Commission of Arkansas to make Orders No. 305 and No. 327, alleging Order No. 305 to be unreasonable and void. It stated that the defendant was operating a line of railway from East St. Louis, in the State of Illinois,

to Texarkana, Arkansas, and to Shreveport, Louisiana, and that its line passed through the State of Illinois, Missouri, Arkansas and Louisiana, where it was engaged as a common carrier in transporting and carrying interstate commerce. It alleged that during the summer and fall of 1905 Philip Reinsch and others demanded many cars, a large number of which were supplied, but that it was impossible to furnish all. The reason for this was that at that time, there was an unexpected and unusual demand made on defendant for cars; that the available cars were apportioned to the various shippers, including Reinsch, according to their respective needs as fairly as possible; that, if it had furnished Reinsch any more cars, other shippers along the line would have been deprived of their proportion; that, anticipating an increase in business, defendant had attempted to place an order for two thousand additional freight cars, but all manufacturers declined the order because they were already overrun with business; that defendant thereupon, at the cost of many thousands of dollars, began the building of car shops of its own. It was further alleged that defendant was engaged in carrying interstate shipments in the States of Illinois, Missouri, Arkansas and Louisiana, and that it could not, during certain seasons of congested traffic, furnish all cars demanded of it; that, if it was compelled to obey Order No. 305, it would have to discriminate against interstate shippers; that Order No. 305 was repugnant to and in conflict with the Commerce Clause of the Constitution of the United States, that it was a burden on interstate commerce, that it was unreasonable, and that it was a taking of property without due process of law. (Printed Transcript, pages 5-8.)

VII.

At the trial in the Circuit Court of Arkansas County, Arkansas, testimony was introduced by both parties, and the trial court refused to give, at the request of defendant, the following instructions to the jury:

"The court instructs you that the complaint in this case is for a penalty as provided by the statutes of Arkansas for violating the order 305 of the Arkansas Railroad Commission, as set out in said complaint, for the refusal of defendant company to furnish to Reinsch the cars ordered by him as provided by said order. The court instructs you that there being no provision in said order that would excuse the defendant railway company from furnishing the cars ordered against any contingency that might arise, and said order providing that defendant and all other railway companies doing business in Arkansas should furnish all cars ordered without any conditions whatever, that a suit based on a violation of said order by plaintiff to recover the penalty provided by the statute of this State in such cases, is a taking of defendant's property without due process of law, and is a denial to it of an equal protection of the law and in conflict with Section 1 of Article XIV of the Amendments to the Constitution of the United States, and said order 305 of said Railroad Commission is void and plaintiff is not entitled to recover in this case." (Printed Transcript, page 84.)

"If you find from the evidence in this case that if defendant was compelled to furnish all the cars ordered by State shippers for State shipments under order 305 of the Arkansas Railroad Commission, and that in doing so defendant would have been compelled to have discriminated against interstate shippers in the furnishing of cars, then in such cases said order is in conflict with the United States statutes governing common carriers engaged in interstate

commerce traffic and is void, and your verdict should be for the defendant." (Printed Transcript, page 83.)

Other instructions were given, and the jury returned a verdict for the plaintiff in the sum of $1,375, for which amount judgment was entered. On appeal to the Supreme Court of the State, this judgment was affirmed (Printed Transcript, pages 90, 91, 97), and the railway company sues out this writ of error to reverse said judgment.

The judgment of the court below bases the liability of the railway company upon the sections of the statute above quoted, and it is the contention of the plaintiff in error that Order No. 305 of the Railroad Commission of Arkansas (which is the necessary basis of this action), and said statutes, as construed by the Supreme Court of Arkansas, and as applied to the furnishing of cars in this suit, are void as a regulation of interstate commerce.

SPECIFICATION OF ERRORS.

I.

The Supreme Court of the State of Arkansas erred in holding and deciding that Order No. 305, promulgated by the Railroad Commission of the State of Arkansas, on the 5th day of August, 1905, was not a burden on interstate commerce and in refusing to hold that said order was a burden on interstate commerce; and in refusing to hold that said order was in conflict with the provisions of

the Act of Congress entitled "An Act to Regulate Interstate Commerce," passed on February 4, 1887, and Acts of Congress amendatory thereof.

II.

The Supreme Court of Arkansas erred in holding and deciding that Order No. 305, promulgated by the said Railroad Commission of the State of Arkansas, as aforesaid, was valid. The validity of said order was denied and drawn in question by the appellant and defendant below on the ground that it was repugnant to the Constitution and laws of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding:

1. That the said Order No. 305 did not create a burden on interstate commerce, and was not in conflict with the provisions of the Acts of Congress passed for the purpose of regulating interstate commerce.

2. The court erred in refusing to hold and decide that said Order No. 305, promulgated by the Railroad Commission of the State of Arkansas, as aforesaid, was repugnant to and in conflict with the Commerce Clause of the Constitution of the United States, and the laws passed by Congress in pursuance thereof, and in refusing to hold and decide that said order would operate upon and directly burden interstate commerce, and would cause a preference to state, as against interstate business.

3. Said court erred in not holding that said Order No. 305, promulgated by the Railroad Commission of said State, as aforesaid, was in conflict with Section 1 of Article XIV of the Amendments to the Constitution of the United States.

III.

Sections 6803 and 6804 of Kirby's Digest of the Laws of the State of Arkansas, as same are construed by the court, in its judgment and decision in said cause, are in conflict with and in violation of Section 8, Article I of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several States, and are in conflict with and in violation of the Act of Congress entitled "An Act to Regulate Interstate Commerce," approved February 14, 1887, and amendments thereof and supplements thereto.

And said court erred in so holding and construing said statute, and in enforcing the same, because said statute, as construed by said court in its aforesaid ruling, is in conflict with, and in violation of the aforesaid provisons of the Constitution of the United States and Acts of Congress passed in pursuance thereof.

IV.

Said court erred in holding and deciding that the lower court, in which said cause was tried, committed no error in its refusal to give the following instruction, asked by this petitioner, at the trial of said cause, viz.:

"If you find from the evidence in this case that if defendant was compelled to furnish all the cars ordered

by State shippers for State shipments under order 305 of the Arkansas Railroad Commission, and that in doing so defendant would have been compelled to have discriminated against interstate shippers in the furnishing of cars, then in such cases said order is in conflict with the United States statutes governing common carriers engaged in interstate commerce and traffic, and is void, and your verdict should be for defendant," and in approving and affirming the ruling and action of the lower court in such refusal.

V.

Said court in refusing to hold that the lower court, in which said cause was tried, erred in refusing to give to the jury the following instruction which was requested by petitioner herein at the trial of said cause, viz.:

"The court instructs you that there being no provision in said order (referring to Order No. 305) that would excuse the defendant railway company from furnishing the cars ordered against any contingency that might arise, and said order providing that defendant and all other railway companies doing business in Arkansas should furnish all cars ordered without any conditions whatever, that a suit based on a violation of said order by plaintiff to recover the penalty provided by the statute of this State in such cases, is a taking of defendant's property without due process of law and is a denial to it of an equal protection of the law and in conflict with Section 1 of Article XIV of the Amendments to the Constitution of the United States, and said order 305 of said Railroad Commission is void, and plaintiff is not entitled to recover in this case," and in approving

and affirming the ruling and decision of the lower court in refusing to give said instruction to the jury at the trial of said cause.

BRIEF.

I.

ORDER NO. 305 OF THE RAILROAD COMMISSION OF ARKANSAS, OR SECTIONS 6803 AND 6804 OF KIRBY'S DIGEST, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, BEING THE NECESSARY BASIS FOR THIS SUIT, AND BEING, BY THEIR TERMS AND AS SO CONSTRUED, A BURDEN ON INTERSTATE COMMERCE, THERE IS A FEDERAL QUESTION INVOLVED, AND THIS COURT HAS JURISDICTION.

Arrowsmith v. Harmoning, 118 *U. S.*, 194;
Leathe v. Thomas, 207 *U. S.*, 93;
Houston & T. C. Rd. Co. v. Mayes, 201 *U. S.*, 321;
Gibbons v. Ogden, 9 *Wheat*, 1;
United States v. E. C. Knight Co., 156 *U. S.*, 1;
Wabash, Etc., Ry. Co. v. Illinois, 118 *U. S.*, 557;
Gloucester Ferry Co. v. Pennsylvania, 114 *U. S.*, 196.
Johnson v. So. Pac. Co., 196 *U. S.*, 1.

II.

THE ORDER OF THE RAILROAD COMMISSION OF ARKANSAS, KNOWN AS ORDER NO. 305, AND SECTIONS 6803 AND 6804 OF KIRBY'S DIGEST, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, IN THIS SUIT ARE VOID AS A REGULATION OF INTERSTATE COMMERCE.

(1) A REGULATION OF THE INSTRUMENTALITIES OF INTERSTATE COMMERCE IS A REGULATION OF THAT COMMERCE, AND IS REPUGNANT TO THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Gloucester Ferry Co. v. Pennsylvania, 114 *U. S.*, 196;
United States v. E. C. Knight Co., 156 *U. S.*, 1;
Johnson v. Southern Pac. Co., 196 *U. S.*, 1;
Cooley v. Board of Wardens, 12 *How.*, 299;
Hall v. De Cuir, 95 *U. S.*, 485;
Covington Bridge Co. v. Kentucky, 154, *U. S.*, 204;
Louisville Rd. Co. v. Stock Yards Co., 212 *U. S.*, 132;
Miss. R. R. Com. v. Illinois Cent. R., 203 *U. S.*, 335;
McLean v. Denver, Etc., R. Co., 203 *U. S.*, 38;
Adams Expres Co. v. Kentucky, 214 *U. S.*, 218;
Rhodes v. Iowa, 170 *U. S.*, 412;
Central Stock Yards Co. v. Louisville & N. R. Co., 118 *Fed.*, 113;
Smith v. Alabama, 124 *U. S.*, 465;
Nashville, C. & St. L. R. Co. v. Alabama, 128 *U. S.*, 196;
Hennington v. Georgia, 163 *U. S.*, 299;
New York, Etc., R. Co. v. New York, 165 *U. S.*, 628.

(2) THE ORDER OF THE RAILROAD COMMISSION AND THE STATUTES OF ARKANSAS, AS APPLIED TO THE FACTS IN THIS CASE, IMPOSE A DIRECT BURDEN ON INTERSTATE COMMERCE.

Houston & T. C. Rd. Co. v. Mayes, 201 *U. S.*, 321;
McNeil v. Southern Ry. Co., 202 *U. S.*, 543;
United States v. E. C. Knight Co., 156 *U. S.*, 1;
Wabash, Etc., Ry. Co. v. Illinois, 118 *U. S.*, 557;
Southern Ry. Co. v. Commonwealth, 107 *Va.*, 771; 60 *S. E. Rep.*, 70;
Minnesota v. Barber, 136 *U. S.*, 313;
Brimmer v. Rebman, 138 *U. S.*, 78;
Voight v. Wright, 141 *U. S.*, 62.

(3) THE ORDER AND STATUTES ARE VOID BECAUSE CONGRESS HAS LEGISLATED WITH RESPECT TO THEIR SUBJECT MATTER IN THE ACT TO REGULATE COMMERCE, APPROVED FEBRUARY 4, 1887, AND AMENDMENTS THERETO.

U. S. Comp. Statutes, 1901, *p.* 3155, 3172;
Pennsylvania Rd. Co. v. Hughes, 191 *U. S.*, 477;
Gulf C. & S. F. R. Co. v. Hefley, 158 *U. S.*, 98.

III.

THE ORDER OF THE RAILROAD COMMISSION AND THE STATUTES OF ARKANSAS ARE VOID, BECAUSE THEY ARE UNREASONABLE, AND THEIR ENFORCEMENT CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW. THEY ARE, THEREFORE, IN CONFLICT WITH SECTION 1, ARTICLE XIV OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Yick Wo v. Hopkins, 118 *U. S.*, 356;
Houston & T. C. R. Co. v. Mayes, 201 *U. S.*, 321;
Reagan v. Farmers' Loan & Trust Co., 154 *U. S.*, 362;
Covington, Etc., Turnpike Road v. Sandford, 164 *U. S.*, 578;
L. S. & M. S. R. Co. v. Smith, 173 *U. S.*, 684;
Railroad Co. v. Husen, 95 *U. S.*, 465;
Henderson v. Mayor, 92 *U. S.*, 259;
Chicago, Etc., R. Co. v. Minnesota, 134 *U. S.*, 418;
Lawton v. Steele, 152 *U. S.*, 133;
St. L. & S. F. Co. v. Gill, 156 *U. S.*, 649;
Lochner v. New York, 198 *U. S.*, 45

ARGUMENT.

I.

ORDER NO. 305 OF THE RAILROAD COMMISSION OF ARKANSAS, OR SECTIONS 6803 AND 6804 OF KIRBY'S DIGEST, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, BEING THE NECESSARY BASIS FOR THIS SUIT, AND BEING, BY THEIR TERMS AND AS SO CONSTRUED, A BURDEN ON INTERSTATE COMMERCE, THERE IS A FEDERAL QUESTION INVOLVED, AND THIS COURT HAS JURISDICTION.

This was an action to recover penalties under the statutes for failure to obey an order of the Railroad Commission of Arkansas. Recovery was had in the trial

court in the sum of $1,375.00, and was sustained by the Arkansas Supreme Court. That court held that a determination of the validity of Order No. 305 of the Railroad Commission of Arkansas, on which the action was based, was not necessary to its decision, and held that the duty to furnish cars was made a statutory one by Sections 6803-6804, Kirby's Digest. It was the apparent purpose of the court to keep a Federal question out of the case, but if there was such a question with reference to Order No. 305, it still obtains, under the decision with reference to the statutes. If the interpretation of the State Court be read into the statutes, the objection which the railroad company made to Order No. 305 may still be made to the sections of the statutes as now construed by the Supreme Court of Arkansas. The construction rendered the sections referred to subject to constitutional objections. Two Federal questions are presented in the case: (1) that the order, or statutes as construed, are a burden to interstate commerce, and so conflict with the power of Congress to regulate interstate commerce; (2) that the order, or sections of the statutes as construed, amount to a denial of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States. Both questions were urged at every stage of the proceedings. They were set out in the answer; they were presented in the defendant's request for instructions; they were urged in the motion for new trial, and were made the basis for the defendant's appeal to the Supreme Court of Arkansas, and were again presented to that court on a petition for rehearing.

It is true that the Supreme Court of Arkansas in its

decision did not mention the Federal questions involved, but this is not essential so long as a Federal question is necessarily passed upon. In *Arrowsmith v. Harmoning*, 118 *U. S.*, (1885), 194, Mr. Chief Justice Waite said:

> "It was for this reason, perhaps, that the Supreme Court, while affirming the judgment of the District Court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied."

We concede it is well settled that where there are non-Federal grounds on which the decision might have been based, the Supreme Court of the United States will not take jurisdiction. The writ of error in *St. Louis Southwestern Railway Company of Texas vs. City of Tyler, Texas*, (1908), 212 *U. S.*, 552, was dismissed for this reason on the authority of the cases there cited, the court holding that there was a "non-Federal ground on which the judgment rested, sufficient to sustain it without reference to the Federal question, *if any, involved.*" Mr. Justice Brewer, in *Egan v. Hart* (1896), 165 *U. S.*, 188, states the rule as follows:

> "If these questions of fact are adequate to determine the controversy between the parties and broad enough to maintain the judgment independent of any Federal question, then we are without jurisdiction, even though the State Court may have decided such a question."

In the recent case of *Waters-Pierce Oil Company v. Texas*, 29 Supreme Court Reporter (February 15, 1909),

page 227, the court denied the writ of error because, as it said,

> "It is well settled in this court that where the State Court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient to maintain the judgment, this court will not review the case."

The test seems to be whether or not the Federal questions involved are substantial ones, and whether they have been relied upon by the party claiming a right or immunity under the Constitution of the United States, and he has been diligent in setting up his claim at the earliest stage of the proceedings, and where the State Court has evidenced in its opinion a purpose to evade the Federal question or to place its decision without the jurisdiction of the Supreme Court of the United States, the latter court should not be slow to take jurisdiction. This seems to be the intent of the language used by Mr. Justice Holmes in *Leathe v. Thomas* (1907), 207 *U. S.*, 93. He says:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that the State Court, even if ostensibly deciding a Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction. *Johnson v. Risk*, 137 *U. S.*, 300."

That the learned Justice's imagination was not overvivid, and that his prophecy was not too extravagant, is evidenced by its fulfillment in the decision of the Arkansas Supreme Court in the case at bar. A reading of the record in this case will convince the most impartial mind that the State Court has placed its decision on utterly untenable grounds, and has read into the statutes of the State a construction which they have never been given before. Although Order No. 305 of the Railroad Commission of Arkansas was set up in the complaint and the penalty for the violation of this order was recovered in the court below, the Supreme Court held that a determination of its validity was unnecessary, as an action for failure to furnish cars may be maintained under Sections 6803, 6804, 6808, 6813 and 6814, Kirby's Digest. Up to the decision of this case the Arkansas Supreme Court had consistently held that an unprecedented demand was sufficient to excuse a carrier for failure to furnish cars .

St. Louis Southwestern Ry. Co. v. Leder, 79 *Ark.*, 59;
St. Louis, Iron Mt. & Sou. Ry. v. Wynne H. & C. Co., 81 *Ark.*, 373;
St. Louis, Iron Mt. & Sou. Ry. v. State, 84 *Ark.*, 150;
St. Louis, Iron Mt. & Sou. Ry. v. Ozier, 86 *Ark.*, 179;
St. Louis Southwestern Ry. Co. v. Leder, 87 *Ark.*, 298.

In *St. Louis Southwestern Ry. Co. v. Clay County Gin Co.* (1906), 77 *Ark.*, 357, the court considered these same sections of the statutes, especially Sections 6804 and 6808, and Mr. Justice Wood made these significant remarks:

"The statute did not intend to make the duty of carriers to furnish transportation facilities an absolute one, for it would be unreasonable to conclude that the Legislature intended to impose upon them duties that under certain conditions could not be anticipated by them, and which it would be impossible to perform, and yet for such non-performance to exact of them heavy penalties. To be sure, a carrier is liable where he fails entirely to furnish transportation. But the liability of the carrier under the Act of March 11, 1899 (Kirby's Digest, 6804), is founded, not so much on the inadequacy of the facilities at his command to supply the demands of the shipper, as on his refusal or failure to make the facilities which he has available to all who are similarly situated, without discrimination or delay. For the Act makes it the duty to furnish without discrimination or delay. So, if the carrier, by reason of some unforeseen and unusual or unprecedented condition in the traffic, is unable to furnish cars for the accommodation of all shippers, he must, in order to escape liability under this statute, furnish such as he has to all shippers without discrimination or delay."

The action in the case under consideration was for failure to furnish cars entirely and not for discrimination, and yet the court, without reference to its previous construction of the statutes on which it sought to base its decision, holds that under those statutes the company is liable for a failure to furnish cars. The ground of decision which it seeks to substitute for the Federal question is, in the language of Mr. Justice Holmes, above quoted, "so palpably unfounded that it could not be presumed to have been entertained."

It is conceded that the order of the Railroad Commission and the statutes relied upon by the Supreme Court of Arkansas can not be made to apply to the fur-

nishing of cars for shipments to other States. As applied to interstate commerce, they are void, as an attempt by the State to regulate that commerce. They would fall under the condemnation pronounced against the Texas statute in *Houston & Texas Central Railroad Company v. Mayes*, 201 *U. S.*, 321, and the Supreme Court of the United States would have the same jurisdiction as in that case, to pass upon their validity. But, it is contended, all the cars in the instant case were ordered for shipment to points within the State of Arkansas, and the question is one of intrastate commerce. That, however, is not true. The point of destination of the cars makes no difference whatever. The object of these rules is not to affect directly commerce, either interstate or intrastate, but the instrumentalities by which commerce is carried on. The railroad company does not have separate cars for the two classes of business. Any regulation of the handling of these cars affects interstate commerce equally, whether it apply to their use merely between stations within a State or between stations in different States. Shylock said:

> "You take my house, when you do take the prop that doth sustain my house; you take my life, when you do take the means whereby I live."

Interstate commerce is regulated by the regulations of its instrumentalities, and a car is none the less an instrumentality of interstate commerce when it is temporarily withdrawn from that class of service and used in intrastate business.

We submit, therefore, that there is a Federal question necessarily involved, and that this court has jurisdiction.

II.

THE ORDER OF THE RAILROAD COMMISSION OF ARKANSAS, KNOWN AS ORDER NO. 305, AND SECTIONS 6803 AND 6804 OF KIRBY'S DIGEST, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, IN THIS SUIT, ARE VOID AS A REGULATION OF INTERSTATE COMMERCE.

(1) A REGULATION OF THE INSTRUMENTALITIES OF INTERSTATE COMMERCE IS A REGULATION OF THAT COMMERCE, AND IS REPUGNANT TO THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

That the power of Congress to regulate interstate commerce given to it by Section 8, Article I of the Constitution of the United States, is not limited strictly to the articles of commerce, but applies, as well, to the instrumentalities thereof, has been repeatedly held.

In *Gloucester Ferry Co. v. Pennsylvania,* 114 *U. S.,* 196, the Supreme Court of the United States said:

> "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce as well as commerce with foreign nations, vested in Congress, is the power to prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature and

sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character ,and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress."

Again, in the case of *United States v. E. C. Knight Company*, 156 *U. S.*, 1, Mr. Chief Justice Fuller said:

> "Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated."

In *Johnson v. Southern Pacific Co.*, 196 *U. S.*, 1, a dining car, not then in use as such and standing on a side track, was held to be an instrumentality of interstate commerce. Mr. Chief Justice Fuller, who delivered the opinion of the court, at page 22, said:

"Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe v. Errol,* 116 *U. S.,* 517, is cited as supporting that contention. In *Coe v. Errol,* it was held that certain logs cut in New Hampshire and hauled to a river in order that they might be transported to Maine were subject to taxation in the former State before transportation had begun.

"The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.

"Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

(2) THE ORDER OF THE RAILROAD COMMISSION AND THE STATUTES OF ARKANSAS, AS APPLIED TO THE FACTS IN THIS CASE, IMPOSE A DIRECT BURDEN ON INTERSTATE COMMERCE.

If it were true, that railroad companies could furnish shipping facilities to all shippers upon demand, then it might be admitted that this order of the commission would have no effect on interstate commerce if properly limited to intrastate shipments. But such is not the case. At certain seasons of the year the crops from the agricultural sections begin to move toward the eastern

ports; trade is stimulated; manufactured goods are demanded in greater quantities; coal must be shipped to the manufacturing points; all the business activities of the country spring into life and vigor at one time; traffic becomes congested at terminal and junction points; the movement of freight and the delivery of cars are necessarily impeded and delayed. Again, unforeseeable accidents occur; freshets cause washouts; bridges are swept away by torrents and destroyed by fires; strikes are declared which paralyze traffic. In short, we have not yet reached that stage of human perfection when all the wants of shippers can be immediately supplied. This fact is recognized by the Interstate Commerce Commission in *Riddle, Dean & Company v. Pittsburg & L. E. Ry.*, 1 *Int. Com. Rep.* 689, where Commissioner Bragg says:

> "The vest fluctuations and unforeseen development of commerce, or the fault or misfortune of some one or more connecting lines, may occasionally bring about a condition of affairs in which the best managed railroad, and with the most ample freight equipment, is unable to move at once as promptly as tendered all the freight upon its line, and this without any fault of its own. There is no evidence that the freight equipment of the Pittsburg & Lake Erie Railroad Company had been unequal to the business of the previous season; and yet in the season the latter part of which is complained of, it appears in the exercise of good faith and prudent preparation in the line of its duty, to have increased its freight equipment over what it had been in the previous season, and to have kept it well in hand upon its own line for the movement of freight of that line; and in addition to this, it had a right to rely, and did rely, upon its arrangements with the Lake Shore & Michigan Southern Railway Company and the New York, Pennsylvania & Ohio Railroad Company for

cars. It certainly is the duty of every railroad company to provide itself with a sufficient freight equipment, and to keep this well in hand for the prompt movement of freight over its line, based upon known and probable estimates of the business of a season. This the Pittsburg & Lake Erie Railroad Company seems, from the evidence, to have done; but when an immense volume of local freight was held back by shippers for several months and then precipitated by them upon this carrier, all at once, it could not furnish all the cars thus demanded for the instant movement of this mass of accumulated freight. It did, however, do all in its power to move this freight as quickly as possible. This was no violation of the third section of the Act to Regulate Commerce."

A statute of similar nature, but more reasonable in its provisions, was held void, as applied to interstate commerce, by the Supreme Court of the United States in the recent case of *Houston & Texas Central Railroad v. Mayes*, 201 *U. S.*, 321. The court there says:

"While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no

allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather."

Again, at p. 330, they say:

"Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad company in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damages could actually have resulted to the shippers.

"It should be borne in mind that the act does not apply to cattle alone, but to all cases 'when the owner, manager or shipper of any freight of any kind shall make application in writing,' etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the Act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of $25 for each car, though the detention of the cotton involved no expense to the owner, or may even have resulted in a benefit to him through a rise in the market.

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill

all its legal requirements can not provide for, and against which the statute in question makes no allowance."

The order of the Railroad Commission and Statutes of Arkansas are not limited to intrastate shipments. But even if they should be so construed, they are still not a matter of mere local concern. Order No. 305, and Sections 6803 and 6804 of Kirby's Digest, as applied by the Arkansas Court, lay hold of the transportation facilities for interstate as well as intrastate commerce; and the more they are limited in their operation to local traffic, the more they work a discrimination against interstate traffic in times of car shortage. Their effect is the same as if they provided that in such times a carrier should supply all local demands before using any of its cars in interstate business. If the rule were so worded, we think the court would not hesitate a moment to declare it void; we submit that its effect is the same as if it were so expressed, and that it is equally void. *McNeil v. Southern Ry. Co.*, 202 *U. S.*, 543.

It must be conceded that although the power of Congress to regulate interstate commerce is exclusive, yet the States, through their police power, may make regulations that incidentally affect such commerce.

A recent case in which this principle was discussed, and the cases in which various regulations have been upheld are collected, is *Missouri Pacific Ry. Co. v. Larrabee Flour Mills Co.* (1909), 29 Sup. Court Reporter (Feb. 15, 1909), page 214.

We recognize a distinction between these cases and the one under consideration. There the commerce in-

volved was wholly interstate, while here it is admitted that the only commerce involved was intrastate. The State regulates its own commerce through the exercise of its police power, which is an incident to the State's inherent sovereignty. That power is plenary and is only limited by the provisions of the United States Constitution. On the other hand, the Federal Government possesses no police power, as it is purely a government of delegated powers, and regulates interstate commerce by virtue of the powers conferred upon it by the commerce clause of the Constitution. How far each authority may go in the exercise of these respective powers, and wholly within constitutional limits on the one hand, or without transcending delegated power on the other hand, and yet interfere with some governmental function of the other, has not been definitely determined, so far as our investigation goes. From an examination of the decided cases on this subject, it seems that in making this contention; that is, that the State can not exercise police power over its own commerce to the detriment of interstate commerce, we present a new issue.

The Supreme Court of the United States seems to have approached the question in

McNeil v. Southern Ry. Co. (1905), 202 *U. S.*, 543, where the Court said:

> "And because we confine our decision to the issue which necessarily arises, we do not intimate any opinion upon the question pressed at bar as to whether an order which was solely applicable to purely State business, directing a carrier to deliver property upon a private track, beyond the line of the railway company, would be repugnant to the due process clause of the Constitution."

The question had been presented in the aspect we have given it, but the court there construed it to refer to the due process of law clause, and as that was not necessary to a decision in the case, the question was left undecided.

In *ex parte Young* (1907), 209 *U. S.*, 123, the effect of the reduction by the Legislature of State rates on interstate rates was presented as an independent Federal question. The court there said that it was "not a frivolous one," but the case went off on the due process of law clause.

Also, in the Missouri Rate case (*St. L. & S. F. Ry. et al v. Hadley*, 168 *Fed.*, 317), McPherson, D. J., commented on this proposition and discussed the cases, but held that the facts before him did not warrant an application of the principle.

These were all rate cases. In the case under consideration, the manner of furnishing cars to interstate shippers on the one hand, and intrastate shippers on the other hand, is of more importance to the shipping public than a question of rates. Inequitable car distribution will result in a more direct burden to interstate commerce than any question of compensation to the carrier, for the shippers alone are more vitally interested. The proposition involved here is solely one of equitable distribution of cars between the two classes of shippers. A comparison of the present judicial rules as to interstate commerce and as to intrastate commerce will demonstrate the practical working of the regulations:

As to Interstate Commerce.

In *Houston & Texas Central Ry. v. Mayes* (1906), 201 *U. S.*, 321, the court had under consideration a Texas statute which required the delivery of cars within six days from the time they were requested, which provided that the law "shall not apply in cases of strikes or other public calamity." The Texas court of last resort had applied this to an order for cars for interstate shipments. The Supreme Court of the United States held the statute was a burden on interstate commerce because "it made no exception in cases of sudden congestion of traffic and actual inability to furnish cars by reason of their temporary and unavoidable detention in other States or in other places within the same State," etc. The court said:

> "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance."

This then is the rule which the court deemed reasonable as to interstate commerce. The shipments involved were interstate and the statute was an attempt to regulate interstate commerce; so, it may be assumed that even if the Act had been passed by Congress itself, the ruling would have been the same under the due process of law clause of the Fifth Amendment, for the court predicated its decision on the unreasonableness of the regulation.

Furthermore this is now made the statutory rule on the subject by the first and third Sections of the Act to Regulate Commerce, which provides that it "shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such transportation upon a reasonable request therefor," the word "such" referring to transportation in the preceding sentence of the Act, which includes the vehicle and all instrumentalities and facilities of shipment, etc.

The spirit of the Act is further demonstrated in that part of Section 1 which provides for switch connections, etc., and states "and shall furnish cars for the movement of such traffic to the *best of its ability* without discrimination in favor of or against any such shipper."

The duty to furnish cars for interstate shipments is discussed and the Act in this respect construed by the Circuit Court of Appeals for the Fourth Circuit, in

U. S. v. B. & O. (1908), 165 *Fed.*, 113.

As to Arkansas Intrastate Commerce.

Under the construction placed upon the laws of Arkansas, by the Supreme Court of that State in the present case, a failure to furnish cars is not excused by causes beyond the control of the carrier. While the court recognized the great value—the necessity—of a carrier sending cars off its rails, yet it holds that it is the absolute duty of one originating line, no matter how weak it may be in comparison to the great trunk lines of the country, to dictate rules to those other stronger lines to secure the prompt return of its cars, and to provide equipment enough, not only for the ordinary business, but for unex-

pected, unprecedented and unforeseen demands. In other words, the duty to furnish cars for intrastate business is an absolute one, while the duty to furnish cars for interstate business is a qualified one.

If the court in the case under consideration neglected to fully state the full force of its decision, it remedied that oversight in—

Oliver v. C. R. I. & P. Ry. Co., 16 *Ark. Law Reporter No.* 7 (*Mch.* 24, 1909) 509.

This was a decision sustaining the validity of the Arkansas Reciprocal Demurrage Act, and was a suit to recover the penalty provided for by that Act, for failure to furnish cars within six days. The court there construed the State's absolute control of its domestic commerce, and said:

> "Federal control of interstate commerce is no more plenary than the State's control of domestic business; in fact it is even less so in a particular not necessary to the decision of this case—that is while Federal control of interstate commerce may be somewhat affected by the police regulations of a State, there is probably no way in which the State's regulation of domestic commerce can be qualified, except as it may be done by provisions of the State's Constitution, or those higher rights of property which are superior to Constitutional sanction."

(This is an obvious misstatement of the law, but it illustrates the spirit of the State court. The judge who delivered the opinion cited *Central of Ga. Ry. v. Murphy* (1905), 196 *U. S.*, 194, but he apparently overlooked these remarks of Mr. Justice Peckham:

> "The power to regulate the relative rights and duties of all persons and corporations within the

limits of the State cannot extend so far as to thereby regulate interstate commerce. The police power of the State does not give the right to violate any provision of the Federal Constitution.")

The court conceded that the Act under consideration was void as to interstate commerce. It discussed the doctrine of the Mayes case with reference to interstate commerce, and held that it could not accept it as controlling with reference to intrastate business, and the court said:

> "The failure to furnish cars under the terms of the Act under investigation will establish prima facie a breach of duty on the part of the railroad companies, though it will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it impossible to answer all demands made for cars for intrastate business would apparently be within the limit of proper defenses in cases of demands too unusual to be foreseen, and viewed in this way the Act is relieved of the imputation of burdening interstate commerce."

We concede this to be a proper statement of the law and submit that the record of the case at bar will show that this defense was fully made by the defendant, and that it did not avail under the construction placed upon the laws by the Supreme Court of Arkansas.

The doctrine of the Arkansas Supreme Court is clearly outlined in these two cases. What is the effect in its practical workings? Whether or not it was the intention of the court to so construe its laws as to give the intrastate shipper a preference over the interstate shipper, it is impossible to say; yet it is clear that the effect is to give the domestic shipper a distinct advantage.

Bearing in mind the two rules as to interstate commerce and intrastate commerce, and assuming that that rule which the Arkansas Supreme Court has laid down would prevail, suppose that this defendant, having provided itself with sufficient cars for ordinary business, and having made vain efforts to secure a regulation which would obtain the prompt return of its cars to its line, and suppose that an unusual, unprecedented and unforeseen demand for cars came on unexpectedly, the carrier would have to furnish all shippers of domestic commerce in Arkansas with cars as they demanded them in order to avoid the penalties of the law. What cars were left, it might be free to distribute among the interstate shippers according to their needs. Obviously, this is a discriminaton against interstate transportation. It is a direct burden on interstate commerce, for it results in taking the equipment out of interstate commerce to be used in intrastate business exclusively. It is the policy of the law to treat all shippers alike. May an intrastate shipper be preferred over an interstate shipper, even in compliance with the law of the State? If this condition should result, and an interstate shipper complained to the Interstate Commerce Commission or the courts of such discrimination, would it be a defense for the carrier to say that it was acting under the authority of the State law?

In *Northern Securities Co. v. U. S.* (1904), 193 *U. S.* 197, Mr. Justice Harlan made these significant remarks:

> "While every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce, lawfully

established by Congress. No corporate person can excuse a departure from a violation of that rule under the plea that that which it has done or omitted to do is permitted, or not forbidden by the State under whose authority it came into existence."

It seems to us that the rule should be carried further to deny to an interstate carrier the right to set up a defense that although it had provided itself with sufficient cars for ordinary business, under the laws of the State as construed by its Supreme Court, it was compelled, in times of unusual demand, to give the most of its cars to shippers for use in domestic commerce.

That the power of Congress to regulate commerce among the States is exclusive was strongly intimated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 *Wheat.* 1, and it has since been directly so held. Chief Justice Fuller, in the case of *United States v. E. C. Knight Co.*, 156 *U. S.*, at page 11, said:

"On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restriction or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof, and that which is not supreme must yield to that which

is supreme. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches; and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State."

In *Wabash Ry. Co. v. Illinois*, 118 *U. S.*, 557, the court held that a State statute intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property from one State to another is not within that class of legislation which the States may enact in the absence of legislation by Congress, and that such statutes are void even as to that part of such transmission which may be within the State. Mr. Justice Miller, who delivered the opinion, said (page 572):

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of the goods and chattels through the country, the State within whose limits a part of this transportation

must be done could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

It appears from the evidence that from seventy to seventy-five per cent of appellant's business consists of interstate shipments, while from twenty-five to thirty per cent are State shipments. (Printed Trans., p. 19, 37.) During the winter of 1905-6 appellant was able to furnish only sixty per cent of the cars required by each class of shippers. In other words, there was an average daily demand for about 1,200 or 1,400 cars, and an average daily shortage of about 600 cars. (Printed Trans., p. 19-35.)

General Superintendent Green testified that "if the company had furnished the entire quota of 125 cars for local or State business, every thing above their proper quota or equitable division would have been subtracted from the requirements of the interstate movement; that is, about 60 cars a day would have been taken away from interstate shipments and applied to State shipments, which would have necessarily worked a discrimination against interstate shippers." (Printed Trans., p. 20.)

Division Superintendent Peck testified as follows: "Q. If you were compelled to fill all orders made for State shipments as required by this order of the railroad commission, what effect would that have as to discrimination or furnishing cars to the interstate shippers? A. It would discriminate to the extent that we would not move but a small percentage of the interstate shipments. Q. It would then work against the interstate shippers? A. Yes, sir. Q. You would be compelled then to dis-

criminate against interstate shippers if you were to furnish all the cars that are required by the State shippers? A. Yes, sir." (Printed Trans., p. 38.)

Superintendent of Transportation Liggett testified that "the enforcement of the rule of the Arkansas Railroad Commission would discriminate in favor of State loading as against interstate loading. During the winter of 1905 and 1906 if the company had furnished all orders for State shippers the effect would have been to furnish a much less per cent for interstate traffic." (Printed Trans., p. 55-56.)

Suppose that the average daily demand for cars was 1,200. The company, at that time, could furnish only sixty per cent of that number, or 720. Of those demanded seventy per cent, or 840, were for interstate shipments, and thirty per cent, or 360, were for intrastate shipments. Under the rule of equitable distribution, which the company followed, it gave the interstate shippers 504 cars and the intrastate shippers 216 cars; in other words, it divided the available cars between the two classes of shippers so as to give each sixty per cent of the number demanded. It also followed the same rule of distribution as among the individual shippers in each of the classes. On the other hand, if it followed the requirements of Order No. 305, it would have been compelled to furnish to intrastate shippers all the cars demanded by them, or 360 cars. Under the conditions then existing this would have left only 360 cars for interstate shippers, when they were demanding 840. In other words, those shipping between local points, would have received 100 per cent of the cars ordered by them, while those desiring to make shipments out of the State would have been furnished less

than forty-three per cent of the number required. This would have been a discrimination against interstate commerce and would have seriously crippled that class of business.

Besides, the furnishing of all cars demanded by local shippers in the State of Arkansas would reduce the number of available cars in the States of Missouri, Texas and Louisiana.

Both interstate and intrastate shippers in those States would receive a smaller percentage of the cars required by them than would those living in Arkansas. And if the other States should adopt measures similar to Order No. 305, interstate commerce would be practically suspended during periods of car shortage.

A State court ,that of Virginia, has recently passed upon a question very similar in its nature to the one here involved. A rule of the State Corporation Commission provided as follows:

> "When a shipper makes verbal or written application to a railroad company for a car or cars to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight and its final destination, the railroad company shall furnish same within four days from 7 o'clock a. m. the day following such application.
>
> "Or when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than four days notice thereof, computing from 7 o'clock a. m. the day following said application, the railroad company shall furnish such car or cars on the day specified in the application.

"For failing to comply with this rule the company so offending shall forfeit and pay to the shipper the sum of $1.00 per car or fraction of a day's delay after expiration of free time, upon demand in writing, made within 30 days thereafter by the shipper.

"Provided, however, that this rule shall not apply to shipments of coal and coke from mines and ovens."

The Supreme Court of Virginia had this rule under consideration in the case of Southern Railway Company v. Commonwealth, 107 Va. 771, 60 Southeastern Rep. 70. It was contended that the furnishing of empty cars was not interstate commerce or commerce at all, but the court said:

"It would seem quite difficult, if not impossible, to maintain a distinction between interstate commerce as applied to the article to be transported and interstate commerce as applied to the instrumentalities by which such commerce is carried on, especially in view of the fact that it is not questioned that empty cars furnished shippers to be sent into other States are, after they are loaded and put into the custody of the carrier, instrumentalities of commerce, and therefore, commerce itself, the exclusive control of which is in Congress.

"That cars engaged in interstate traffic, although unloaded and not in motion, are instrumentalities of commerce, seems clearly settled in *Johnson v. Southern Pacific Company*, 196 *U. S.* 1, 25 *Sup. Ct.* 158, 49 *L. Ed.*, 363, where the question arose whether a dining car regularly engaged in interstate traffic ceased to be so when waiting for the train to make the next trip, and it was held that it did not; the opinion of the court after refusing the contentions of counsel and authorities cited, saying: 'Confessedly this dining car was under the control of Congress * * * and so within the law.'

"Instrumentalities of commerce are *ex necessitate*, a part of commerce, and if a car for an interstate shipment is to be regarded as a necessary instrumentality by which an interstate shipment is to be carried, and in fact a part of the interstate commercial duty of the carrier to furnish, then interstate commerce cannot be confined to the mere act of transit, since receiving, loading, unloading, switching and delivery are as essentially parts of interstate commerce as the act of transit. It would not be contended that a State should forbid any of these things, as a more effectual way of prohibiting interstate commerce could not be devised; and if, instead of undertaking to forbid the furnishing of cars for interstate shipments, or the loading, or switching, or delivering, the State should undertake to regulate all these things, clearly, as it would seem, upon reason and authority, that would be a regulating of an essential part of interstate commerce.

Gloucester Ferry Co. v. Penn., 114 *U. S.*, 204.

Sup. Ct., 826, 29 *L. Ed.* 158.

Stanley v. Wabash Ry. Co., 100 *Mo.* 435, 13 *S. W.* 709, 8 *L. R. A.* 549."

In discussing the effect of such a rule as the one under consideration, the court said:

"Under the requirements of the rule the equipment of the carrier from other States might have to be withdrawn to an extent necessarily and directly obstructing the movement of interstate commerce originating in such other States.

"When unprecedented conditions arise as they will in the future as in the past, whereby the appellant cannot furnish cars to meet the demands of the shippers in each of these States will it not be natural —in fact a necessity—for it to withdraw the cars in use or needed in this State and send them for the use of shippers in another State; where, for a failure

to furnish cars the penalty to be suffered is much larger than that incurred by a failure to furnish required cars in this State, whereby the conflict and confusion in the conduct of appellant's interstate traffic would not only be brought about, but a direct and unreasonable burden imposed upon interstate commerce? Clearly such a condition of things is not only possible, but likely to happen, as said in the Texas case. Would not the application of a statute or rule to such a state of facts and circumstances as appear in this record necessarily, directly and unreasonably operate as a hinderance to and interference with interstate commerce? This question has been fully answered in the affirmative by the decisions of the Supreme Court of the United States to which we have adverted and to which we must look in determining questions of this character."

We submit that to allow a State to exercise its power over its domestic commerce in such a manner as to prejudice interstate commerce, over which Congress has plenary dominion, is to nullify the mandate of the Constitution that it and laws passed under its authority shall be the "supreme law of the land." Interstate commerce should be left untrammeled and unimpeded by local regulations so it may readily yield to the regulations of the Congress. As has been many times said by the Supreme Court of the United States, one of the main purposes of the Federal Constitution was to make the commerce of the nation free from local restraint imposed by the States.

(3) THE ORDER AND STATUTES ARE VOID BECAUSE CONGRESS HAS LEGISLATED WITH RESPECT TO THEIR SUBJECT MATTER IN THE ACT TO REGULATE COMMERCE, APPROVED FEBRUARY 4, 1887, AND AMENDMENTS THERETO.

The matter of furnishing cars to shippers is, then, of

national interest, and is one for the regulation of which Congress has provided. Section 3 of the Interstate Commerce Act of February 4, 1887, prohibits undue preference and discrimination. (U. S. Comp. Statutes, 1901, p. 3155.) Section 10 of the Act of March 2, 1889, provides for mandamus to compel equal facilities to shippers. (U. S. Comp. Statutes, 1901, p. 3172.) And the courts have provided how the cars furnished shall be prorated in such cases. (*United States ex rel Kingwood Coal Co. v. West Virginia Railway,* 125 *Fed. Rep.* 252.

Section 3 of the Act provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Supreme Court of the United States, in the case of *Pennsylvania Railroad Company v. Hughes,* 191 *U. S.* 477, summarizing the provisions of the Act, said:

> "It may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines."

III.

THE ORDER OF THE RAILROAD COMMISSION AND THE STATUTES OF ARKANSAS ARE VOID, BECAUSE THEY ARE UNREASONABLE, AND THEIR ENFORCEMENT CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW. THEY ARE, THEREFORE, IN CONFLICT WITH SECTION 1, ARTICLE XIV, OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The decision violates the due process of law clause, Constitution of the United States.—Treated as an exercise of the police powers of the State with reference to its domestic commerce and independent of any effect it might have on interstate commerce, either direct or indirect, the decision is violative of the due process of law clause of the Federal Constitution. It is well settled that the State in the exercise of any of its governmental powers, cannot violate any of the limitations of the Constitution of the United States. It is immaterial for this purpose whether the State rests its decision with respect to the duty of a carrier to furnish cars on an order of the Railroad Commission, or on the State statutes. The manner in which those statutes are enforced will be considered by the Supreme Court of the United States in determining whether or not such enforcement deprives any person or corporation of any right or immunity guaranteed to him or it by the Federal Government.

Yick Wo v. Hopkins (1885), 118 *U. S.*, 356, went to the Supreme Court of the United States on a writ of error from the Supreme Court of California. An ordinance of the City of San Francisco made it unlawful for any person to carry on the laundry business in that city without having first obtained the consent of the Board of Supervisors, except the building be constructed of either brick or stone. The plaintiff in error was arrested for a violation of this ordinance and sued out a writ of habeas corpus in the Supreme Court of the State. That court remanded the prisoner to the custody of the sheriff and sustained the ordinance as valid. Mr. Justice Matthews in deciding the case in the Federal Supreme Court said

that although the Supreme Court of the State had construed the ordinance, "it does not preclude this court from putting upon the ordinance of the Supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in the enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involved the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge." So, under the same rule, although the Arkansas Supreme Court has construed its statutes to preclude certain defenses, the Supreme Court of the United States may adopt an independent construction consistent with the Federal Constitution. The statutes may be fair and reasonable on their face. They may in themselves present no constitutional objections, but when they are construed in such a way as to operate unreasonably, they may be then held invalid. The Federal Supreme Court in the Hopkins case said further:

> "In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protec-

tion of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibtion of the Constitution."

It is reasonable to assume that the rules laid down by the Supreme Court of the United States with respect to furnishing cars in interstate business will be equally applicable to statutes or decisions requiring the furnishing of cars for intrastate business. The State regulation whether it be by statute and order of the Railroad Commission, or by decision of the Supreme Court, if unreasonable in its exercise, violates the Fourteenth Amendment of the Constitution of the United States. (Freund on Police Power, Section 63.)

What is a reasonable exercise of the power depends upon the facts and circumstances of each particular case, which may be inquired into by the court. In *W. M. & P. Ry. Co. v. Jacobson* (1900), 179 *U. S.*, 287, the court said:

"Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the Constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railway corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the

facts surrounding the cases in regard to which the judgment was given. The unreasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the questions of its validity. A statement, or a regulation provided for therein is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action."

Taking as a standard of reasonableness the rules applied by Congress and by the Federal courts to interstate commerce, the decision in the case at bar falls far short of reasonableness and enters the domains of arbitrary and drastic regulation which should be condemned.

Conclusion.

Under the pleadings and proof in this case it is impossible to escape the conclusion that this action is based upon order No. 305 of the Railroad Commission of Arkansas. A carrier is under no common law obligation to furnish cars within any prescribed period of time other than that of furnishing them within a reasonable time. There is no other justification for the penalizing of a railroad company for not furnishing cars to one who has failed to put himself in the attitude of a shipper, than this order of the Railroad Commission. If, however, the Supreme Court of Arkansas was correct in deciding that the statutes of the State provided for this without looking to the order of the commission, then the statutes, as so construed, are unreasonable and impose a direct and very

onerous burden upon interstate commerce. By whatever law it may be that carrier is required absolutely to furnish cars upon six days' notice to all who apply for them such a requirement operates as a restriction upon interstate traffic, and for that reason the judgment of the Supreme Court of Arkansas should be reversed.

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Office Supreme Court, U. S.
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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 111.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

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(21,086)

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
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vs.

THE STATE OF ARKANSAS, DEFENDANT IN ERROR.

I.

The Federal Questions.

Although no motion to dismiss the writ of error was filed by the defendant in error, the question of the jurisdiction of this court is raised by its counsel in their brief.

We reiterate that there are two distinct and substantial Federal questions which were properly and duly raised, and that there is no independent non-Federal ground on which the decision of the State court can be sustained.

First. That the order of the Railroad Commission of Arkansas, or the laws of the State as construed by its Supreme Court, or the judgment of the court, interfere with the regulation of a subject of interstate commerce on which

Congress has legislated, and which necessitates such uniform regulation that the jurisdiction of Congress is exclusive, even though it had not legislated.

Second. That the order of the Railroad Commission of Arkansas, or the statutes as construed by the Supreme Court of the State, or its judgment, deprive plaintiff in error of its property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.

Although the action was based upon the order of the Railroad Commission, the Supreme Court of the State waived that aside as unnecessary to the determination of the case and held that the action might have been maintained either at common law or under the statutes of the State, principally sections 6803 and 6804 of Kirby's Statutes of Arkansas.

This, we submit, does not affect the Federal questions, nor is it necessary that the State court expressly pass on the questions if the effect of its decision is to deny the right set up by the one claiming it under the Constitution of the United States.

Erie R. R. *vs.* Purdy, 185 U. S., 198.

There can be no question that the police power of the State cannot be exercised in a way to infringe upon the Federal Constitution. In the Railroad Commission cases, 116 U. S., 307, 331 (1886). Mr. Chief Justice Waite said:

> "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which, in law, amounts to taking private property for public use without just compensation or without due process of law."
>
> Central of Georgia *vs.* Murphy, 196 U. S., 194 (1905).

Nor is it material by what authority of the State the power is exercised, whether by an act of the legislature, or by rule of the Railroad Commission, or by the judgment of the State court itself. If the act of any of these governmental departments impinge on the exclusive jurisdiction of Congress or deprive any person of due process of law or the equal protection of the laws, this court will review the decision below.

Henderson *vs.* Mayor of New York, 92 U. S., 259 (1876).

N. H. & St. J. R. R. *vs.* Husen, 95 U. S., 465 (1878).

Both Federal questions mentioned were raised by the plaintiff in error at every stage of the proceedings, from its answer to the complaint to its motion for rehearing in the Supreme Court. They were specially set up in the answer (Pr. Tr., pages 5 to 8), in the request for instructions to the jury (Pr. Tr., pages 80 to 84), on the motion for new trial (Pr. Tr., page 85), and in the petition for rehearing in the Supreme Court (Pr. Tr., page 96), and the action of the court in each instance, in effect, denied the contentions.

In C., B. & Q. Ry. *vs.* Chicago, 166 U. S., 226, it was urged, on motion for new trial, that the statute providing for condemnation proceedings, the verdict and judgment were contrary to the Fourteenth Amendment, and Mr. Justice Harlan, speaking for the court, said:

> "When the trial court overruled the motion for new trial and entered judgment it necessarily held adversely to these claims of Federal right. But this is not all. In the assignment of errors filed by the defendant in the Supreme Court of Illinois these claims of right under the Constitution of the United States were distinctly reasserted. It is true that the Supreme Court of Illinois did not, in its opinion, expressly refer to the Constitution of the United States, but that circumstance is not conclusive against this court to re-examine the final judgment of the State court. The judgment of affirmance

necessarily denied the Federal rights thus specially set up by the defendant, for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding, so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. * * * There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the National Constitution were not infringed by the proceedings in this case.

"The Fourteenth Amendment prohibitions referred to all instrumentalities of the State, to its legislative, executive, and judicial authorities, and therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State violates that amendment. * * * But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute, prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

The defendant in error claims that there was an independent question of fact sufficient to support the judgment of the State court, and therefore this court will not take jurisdiction, and cites the opinion of the State court to the effect that there was "no unusual, extraordinary or unprecedented rush of business to excuse the carrier's default." We do not so understand the decision. It did hold that there was "no unusual, extraordinary or unprecedented rush of business" on the line of plaintiff in error (Pr. Tr., page 92), but the decision itself shows that there was an unusual rush of business on other lines of railroad which resulted in taking the plaintiff in error's equipment and holding it, and

that the rules which in ordinary times were sufficient to guarantee the return of cars failed during this time. We do not think that this properly reflects the facts. We believe that the evidence plainly shows that there was an unusual and unexpected business on the plaintiff in error's line, and that it was utterly impossible for it, by any method, to keep its proper quota of cars upon its line. We submit that even this is not the deciding of an independent fact which is referred to by the decisions of this court. We are complaining here of the application of the law to the facts, and this court has jurisdiction to examine the facts and determine whether or not the law, as construed by the Supreme Court of Arkansas, will interfere with interstate commerce or deny to the plaintiff in error due process of law.

In Dower *vs.* Richards, 151 U. S., 658 (1893), Mr. Justice Gray said:

> "When, indeed, the question decided by the State court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court."

To the same effect is Henderson Bridge Co. *vs.* Henderson, 173 U. S., 592 (1898). In Walling *vs.* Michigan, 116 U. S., 446 (1885), the defendant below requested the trial court to instruct the jury that an act of Michigan levying a tax on selling liquors was a violation of the United States Constitution. The court refused, and the United States Supreme Court took jurisdiction on a writ of error to the State court and held the act invalid.

In the case at bar the plaintiff in error requested similar instructions, which were refused in the court below, as shown by the assignment of errors (Pr. Tr., page 101), and the Supreme Court, in affirming the judgment of the lower court, approved its action.

While on a writ of error the Supreme Court of the United

States will not inquire whether the verdict was contrary to the evidence, it may determine whether the statute, as interpreted to the jury, violated the Federal Constitution.

It seems also that "the question whether a right of privilege claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of the State court is itself a Federal question in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State."

Carter *vs.* Texas, 177 U. S., 442.

In a recent decision this court, on a writ of error to a State court, minutely examined the evidence to determine whether a Federal statute which was drawn in question had been properly applied (Schlemmer *vs.* B. R., etc., Ry., 205 U. S., 1 (1906), and Mr. Justice Holmes said:

> "It is said that the existence of contributory negligence is not a Federal question, and that as the decision went off on that ground there is nothing open to revision here. We certainly do not mean to qualify or limit the rule that for this court to entertain jurisdiction of a writ of error to a State court it must appear affirmatively that the State court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. (Bachtel *vs.* Wilson, 204 U. S., 36.) But, on the other hand, if the question is duly raised and the judgment necessarily, *or by what appears in fact,* involves such a decision, then this court will take jurisdiction although the opinion below says nothing about it. (K. W. P. Co. *vs.* G. B. & M. C. Co., 142 U. S., 254.) And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake that may be sufficient to warrant a review." (T. H. & I. Ry. *vs.* Ind., 194 U. S., 579.)

We submit that the State court in the case at bar could not have reached its judgment without deciding the Federal matter involved, and that these questions were duly raised

and that the judgment necessarily, by what appears in fact, involved a decision that the regulation as to furnishing cars for intrastate business did not interfere with interstate commerce and that the defendant was not deprived of his property without due process of law. If the court will follow in this case the practice which it adopted in the Schlemmer case it will find that during the months of October, November, and December, 1905, and January, 1906, there was an unusual, extraordinary and unprecedented demand for cars all over the country, and that the plaintiff in error, as well as other railroads, had been diligent to devise rules which in such emergencies would secure the return of cars to the line to which they belonged, but that in times of such unusual demand the lines, such as the plaintiff in error, which originated a large part of their traffic, necessarily, through no fault of their own, lost control of some of their cars, and that the rules which had been effective in times of ordinary business broke down and failed of their purpose. It will find that, although the business of the plaintiff in error during the last three or four years prior to the time when this action began had increased about eight per cent per annum, it had increased its equipment about ten per cent (Pr. Tr., pages 29, 40, 41); that its equipment of about 10,000 cars, or more than 8 cars per mile of road, was larger than that of most roads of this character, but by reason of its originating about seventy per cent of its traffic and receiving on its line about thirty per cent, it necessarily lost control of its cars; that on account of this, only about sixty per cent of the demands could be supplied, and both interstate and intrastate shippers during this time were supplied with their pro rata of cars equitably and without discrimination; that everything possible was done to secure the return of the cars to the line. An attempt was made to transfer shipments at junction points in order to force the roads to which plaintiff in error delivered its traffic to furnish their own cars for shipments which plaintiff in error tendered them, but this only resulted in delay, for the other carriers did not have

the cars to furnish; that plaintiff in error placed an embargo on some of the roads which refused to return its cars and would not permit its cars to go to points on their lines (Pr. Tr., page 44); that when the business of the country began to increase and it was found that the roads that were well supplied with cars could not keep them on their lines in times of car shortage the roads changed the method of paying for the use of other roads' cars from a mileage basis to a per diem; that 20 cents per day was at first tried, then 25 cents per day with a penalty, after the car had been on the line for twenty days, of $1.00 per day; but in times of enormous demands for cars these rules were not effective; that about $3,000,000 was invested by the plaintiff in error for new equipment during a period of three or four years in order to keep up with the demands; that during the car famine it endeavored to place orders for 2,000 cars, but the manufacturers would not take them, and the plaintiff in error then proceeded to build its own car shops for the construction of its own cars (Pr. Tr., pages 13 to 42), and that to comply with the Railroad Commission's order or the statutes as construed and furnish cars to intrastate shippers on demand would deprive interstate shippers of their share.

The Arkansas Supreme Court has given legal vitality to a rule which in effect requires railroads to furnish cars on demand to intrastate shippers. It has held that if rules for the return of cars to the originating lines, effective during ordinary times, fail of their purpose in times of unforeseen and unusual demands, this is no excuse for a failure to furnish cars; and, if carried to its logical conclusion, the decision will result in the assessment of enormous penalties against the plaintiff in error for its inability to furnish cars, caused by circumstances beyond its control; and if the maximum penalties provided by the law, as construed, are assessed, it will result in a confiscation of the plaintiff in error's property.

The evidence in this case (Pr. Tr., page 50) shows that during November, 1905, there was an average daily shortage

of 646 cars; during December, 1905, there was an average daily shortage of 693 cars; and during January, 1906, there was an average daily shortage of 660 cars.

On the basis of penalties assessed in this case, and assuming that the State of Arkansas is entitled to penalties for every car which was not furnished on demand of the shipper during that season, the total penalties would amount to nearly $500,000, or, on the basis of the minimum penalties provided by the statute referred to in the opinion, the total would amount to over $30,000,000. On the other hand, the penalties may be avoided by furnishing cars as demanded by intrastate shippers; and this will deprive the interstate shippers of the cars to which they are entitled.

Of course, these are matters of expediency which the court may not consider in reaching its decision, but they illustrate the necessity of according to the plaintiff in error a legal defense to a suit for an action to furnish cars—that is the inability was caused by circumstances beyond its control—and of the necessity of harmonizing the rules as to interstate and intrastate shipments.

II.

The decision of the Arkansas Supreme Court burdens and interferes with interstate commerce:

First, in that it validates a statute of the State or an order of the Railroad Commission which seeks to regulate the instrumentalities of interstate commerce; and

Second, because its effect is to give a preference to intrastate shippers over interstate shippers in the matter of furnishing cars.

In our original brief in this case we said that in making this contention we realized that we presented a new issue, but we did not mean to be understood as asserting that the broad principles upon which it rests are propositions of first impression. The question was discussed by the learned Chief Jus-

tice Marshall in his decision in Gibbons *vs.* Ogden, 9 Wheat., 210; 6 L. Ed., S. C. Rep., 23 (1824), as follows:

> "Since, however, in exercising the power of regulating their purely internal affairs, whether of trading or police, the States may sometimes enact laws the validity of which depends on their interfering with and being contrary to an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have in their application to this case come in collision with an act of Congress and deprived a citizen of a right to which that act entitles him. Should this collision exist it will be immaterial whether those laws were passed in virtue of a concurrent power to regulate commerce with foreign nations and among the several States or in virtue of a power to regulate their domestic trade and police."

The principle thus announced was directly applied in Hall *vs.* De Cuir, 95 U. S., 485 (1878). In that case the defendant in error, a colored woman, sued Benson, the plaintiff in error's intestate, in the court below. He was the master of a vessel plying on the Mississippi river between New Orleans, La., and Vicksburg, Miss., and other interstate points. A law of Louisiana required carriers to give equal accommodations to all alike, regardless of race or color. The defendant in error tendered herself for passage from New Orleans, La., to Hermitage, La., and demanded equal accommodations with white persons. On being refused she sued for and recovered $1,000 damages. The judgment being affirmed by the Supreme Court of Louisiana, it went to the Supreme Court of the United States on a writ of error for review; and in deciding that the act of Louisiana referred to was invalid, Mr. Chief Justice Waite said:

> "For the purpose of this case we must treat the statute as requiring those engaged in interstate commerce to give all persons traveling in Louisiana upon public conveyances employed in such business equal

> rights and privileges in all parts of the conveyance, without distinction, discrimination, or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a State law by the State courts. It is with this provision of the statute alone we have to deal. We have nothing whatever to do with it as a regulation of internal commerce as affecting anything else than commerce among the States. * * * While it (the statute) purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout the entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or lesser degree those taken up without and brought within, and, sometimes, those taken up and put down without * * * ."

Then, after stating that the inaction of Congress amounts to a declaration that interstate commerce in that respect should be free, the learned Chief Justice said:

> "Applying that principle to the circumstances of this case, the congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage in Louisiana, or without, as seemed to him to be to the best interests of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him that power so long as he is within Louisiana."

Ordinarily, merely incidental interference with interstate commerce in purely local matters will be permitted to the States where Congress has not enacted upon the particular subject; but in those things which require uniformity of regulation this court has held that the power of Congress is exclusive. Walling *vs.* Michigan, 116 U. S., 446 (1885). That is not now material in this case, however, because what-

ever doubt might heretofore have existed as to the application of the interstate commerce law to the furnishing of cars and the Interstate Commerce Commission's power to regulate the distribution thereof the question is definitely settled by this court in the three cases recently decided involving the distribution of coal cars in times of car shortage. Interstate Com. Com. *vs.* Ill. Cent. R. R. Co.; B. & O. R. R. Co. *vs.* U. S. A. *ex rel.* Pitcairn Coal Co.; Interstate Com. Com. *vs.* Chicago & Alton R. R.—all decided January 10, 1910. In Hall *vs.* De Cuir the court had under consideration an instrumentality of interstate commerce and a regulation of a State which only affected the subjects of intrastate commerce, and the same situation is presented by the case at bar. Paraphrasing the language used in the case of Hall *vs.* De Cuir, it may be said that:

> "The act of Congress which requires an equal distribution of cars among shippers in time of car shortage requires the carriers to treat all alike and give to each his pro rata share, and the acts or orders of the Railroad Commission, as construed by the Supreme Court of Arkansas, takes away from the carrier its power to so equitably distribute its cars because of the decision of this court."

In H. & T. C. *vs.* Mayes, circumstances beyond the carrier's control are given as an excuse for the failure to furnish cars, while under the decision of the Arkansas Supreme Court such circumstances are not an excuse.

The De Cuir case has been referred to many times by this court in its later decisions, but we do not find that it has ever been overruled. It was distinguished in L. N. O. & T. *vs.* Mississippi, 183 U. S., 587 (1889), which was a case declaring valid an act of Mississippi requiring separate coaches for the different races; but the court there found that this, as a matter of fact, did not interfere with commerce between the States. It cannot be said that the construction which the Arkansas Supreme Court has put on its statute will not in-

terfere with interstate commerce, for it necessitates a preference of intrastate shippers over interstate shippers.

Furthermore, the act approves of a direct regulation of the instrumentalities of interstate commerce. It is shown by the pleadings and the evidence in this case that the plaintiff is an interstate carrier; that its cars are constantly used by it in interstate commerce; and we think that, for the sake of uniformity in regulation, the time has come when this court must declare that the distribution of such instrumentalities among shippers is not subject to the regulation of a State even in its intrastate commerce. To hold otherwise will be to permit varying rules and regulations in intrastate commerce that are bound to affect interstate commerce. We think that in no other way can uniformity in car distribution be preserved in interstate commerce than by holding that these instrumentalities cannot be subjected to the regulation of the State in intrastate commerce. This proposition was recently discussed by Circuit Judge Sanborne in the case of U. S. *vs.* C. & N. W. Ry. Co., 157 Fed. Rep. 321 (1907), which involved a construction of the safety appliance act. The learned judge there said:

> "The contention that if a railroad company, conducting the transportation of articles of interstate commerce entirely within a single State, and independent of other carriers, is held to be subject to the safety appliance acts it must receive articles of interstate commerce for transportation and all carriage both interstate and intrastate will thus become subject to national regulation neither terrifies nor convinces. The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary in order to regulate interstate commerce fully and effectually. The people of the United States carved out of their sovereign power reserved from the States and granted to the Congress of the United States exclusive and

> plenary power to regulate commerce among the States and with foreign nations. That power is not subordinate, but it is paramount to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by the State of any of its powers impinge or conflict, the former must prevail and the latter must give way. The Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land. That which is not supreme must yield to that which is supreme" (Citing Brown *vs.* Maryland).

The plaintiff in error, as well as other carriers of interstate commerce, have but one set of rails and one set of equipment with which to serve both classes of traffic—State and interstate. In matters purely local in character, these instrumentalities may yield to incidental regulations by State authorities without impairment of their interstate functions, but in matters requiring uniformity there cannot be two or more sets of regulations without producing inequalities in the service to the shipping public, and hardships to the carriers. The instrumentalities of interstate commerce, therefore, must yield to but one governing body, and be free from the restraint of others at all times; and by reason of the constitutional supremacy of its laws, this regulating power must repose in the Federal Government, and when once that Government, through the acts of Congress as construed by the Supreme Court, prescribes rules on a certain subject-matter, the States are precluded from exercising their police powers over such instrumentalities on the same subject-matter, even when temporarily used in intrastate commerce. This must necessarily be so, or the railroads will have to keep separate equipment for each class of commerce, to the detriment of both. For instance, the Federal laws require interstate carriers to have their cars and locomotives equipped with certain safety appliances when used in hauling interstate commerce. As all of an interstate carrier's equipment is at some time used in such

commerce, it is necessary to equip all its cars in the manner prescribed.

Suppose, then, a State required interstate carriers to have their cars equipped with different appliances while moving domestic commerce. Would this court hold that a carrier, which had properly equipped its cars and locomotives in compliance with the Federal act, must also comply with the State requirements? We think not. To do so would unduly and unnecessarily hamper and impede the railroads in carrying on the commerce of the country. The only alternative is the natural and logical declaration that the instrumentalities of interstate commerce are at all times free from State regulations, except in purely incidental and local matters. This doctrine is supported by the prior decisions of this court, and is within the spirit of the commerce clause of the Constitution.

For the purpose of securing uniformity in car distribution in interstate commerce we submit that Congress may, if necessary, incidentally regulate intrastate commerce. We contend that Congress has done so in the act to regulate commerce, which requires equitable distribution of cars. We contend that this act goes so far as to take away from the States the power to regulate the distribution of the same instrumentalities in intrastate commerce.

Therefore, both because of its indirect and necessary effect upon interstate commerce, and because it approves of a regulation of the instrumentalities of interstate commerce, the decision of the Arkansas Supreme Court is an invalid encroachment upon the power of Congress to regulate commerce among the States.

III.

The acts of Arkansas, as construed by the Supreme Court, or the order of the Railroad Commission of that State, or the judgment of the court in this case, deprive the plaintiff in error of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The effect of the decision is to deny to the plaintiff in error a legal defense for its failure to furnish cars—that is, that the failure resulted from circumstances absolutely beyond its control. It is fully shown by the evidence that the plaintiff in error did not lose control of its cars by any fault of its own, and that the shortage of its cars was caused by reason of the large business on its line and throughout the country generally, and because of the nature of its situation as an originating line, sending off of its line more loaded cars than it received, and the refusal of its connections to return empty cars in equal numbers to the loads furnished them. This was a situation which it had no means of controlling. It made every effort within its power to overcome it, and failed. The statutes therefore, as construed, are invalid because they are unreasonable.

The test of due process of law is the reasonableness of the regulation in question, and "arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice," is not due process of law.

The constitutionality of a statute is to be tested not by what has been done, but by what may be done under it.

Stewart *vs.* Palmer, 74 N. Y., 191.
Violet *vs.* Alexandria, 92 Virginia, 561.

We have already shown what may be done under the regulation approved by the Arkansas Supreme Court, and we submit that this is an arbitrary exercise of power.

Police regulations, in order to be valid, must be reasonable; and the question of reasonableness is a judicial one (McGehee on Due Process of Law, page 306, and cases there cited).

The Arkansas reciprocal demurrage act was held void by the United States Circuit Court for the Eastern District of Arkansas in St. L., I. M. & S. *vs.* Hampton, 160 Fed. Rep., 693 (1908), in which the court said that it was clearly shown to be intended to refer to interstate commerce, and that the requirement to furnish cars is absolute "and makes no exception for sudden congestion of traffic, actual inability to furnish cars by reason of their temporary detention in other States, or in other places in the same State, and none for the interference of the traffic occasioned by wrecks, accidents and strikes."

In State *ex Rel.* Washington Mill Co., 86 Pac., 1056 (1906), an act which required railroad companies in shipping lumber to deduct the weight of the standards from the weight of the lumber was held invalid, because it was unreasonable and deprived the railroad company of its property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

We respectfully commend to the careful consideration of the court the case of Southern Railway *vs.* Commonwealth, 107 Virginia, 771. The court there passed upon a statute substantially the same as the one involved in the case at bar and held it invalid.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

ST. LOUIS, SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs. No. 111.

THE STATE OF ARKANSAS, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OF THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

I.

STATUTE LAW OF ARKANSAS CONCERNING FURNISHING OF CARS AND UNDENIED ALLEGATIONS OF COMPLAINT FILED THEREUNDER.

By act of the General Assembly of the State of Arkansas approved March 11, 1899 (*Acts of Arkansas*, 1899, *pp.* 82-99; *Kirby's Digest of Arkansas, Sections*

6787-6826), a law was enacted creating a Railroad Commission and declaring certain duties and liabilities of common carriers, a part of which act is as shown by copy of Sections 6803-6804 of Kirby's Digest, set forth in statement of plaintiff in error on pages 3-4; that part of the act pertaining to this case is as follows:

"Section 6804. * * * And all persons or corporations engaged as aforesaid shall furnish, without discrimination or delay, equal *and sufficient facilities* for the * * * receiving, loading and unloading, storing, carriage and delivery of all property of a like character carried by him, them or it. * * *

Section 6813. * * * If any person or corporation operating a railroad in this State * * * shall *violate any of the provisions of this act* * * * or shall violate * * * any of the rules regarding railroads or express companies as made by said commission * * * such person or corporation * * * shall be liable to a penalty not less than five hundred nor more than three thousand dollars *for each violation of this act* or * * * such rules and regulations, and such penalty may be recovered by an action to be brought in the name of the State of Arkansas, in the county in which such violation may occur. The Commission shall institute such action * * * through the prosecuting attorney of the proper district. * * *"

In pursuance of the terms of this act, authorizing the Commission to make rules regulating common carriers, the Railroad Commission made Order No. 305, effective August 5, 1905, as set out in statement of

plaintiff in error (pages 1-2, printed transcript p. 2), the effect of which was to require cars to be furnished to shippers within five days after 7 o'clock a. m. on day following written application for cars, subject, however, to reasonable excuses for not furnishing as will be hereafter more particularly referred to.

The complaint alleges:

"That Philip Reinsch made written application to the defendant railroad company for cars to be loaded with baled prairie hay to be shipped in car load lots to points therein designated as the final destination thereof—the number of cars applied for and the date of said application and final destination of the shipments being as follows:

October 30, 1905, twelve cars for shipment to Texarkana, Ark.

October 30, 1905, one car for shipment to Hot Springs, Ark.

October 30, 1905, one car for shipment to Anderson, Ark.

November 20, 1905, fifteen cars for shipment to Texarkana, Ark.

December 12, 1905, twelve cars for shipment to Texarkana, Ark.

January 20, 1906, nine cars for shipment to Texarkana, Ark.

Januaray 20, 1906, one car for shipment to Hot Springs, Ark.

* * * That said defendant failed *and refused* to furnish said cars * * * *at any time.*" (Printed Tr., p. 3.)

The foregoing was not denied in the answer (Printed Tr., pp. 5-8) or controverted in the proof.

Further allegations of the complaint (Printed Tr., pp. 3-4) undenied in the answer (Printed Tr., pp. 5-8) are as follows:

"And the said complaint (of Philip Reinsch) duly coming on for hearing before said Commission, *the defendant being present by its attorneys,* was heard and on the fourteenth day of February, 1906, the following order was duly made by said Commission, to-wit:

ORDER OF RAILROAD COMMISSION OF ARKANSAS.

Order No. 324.

Philip Reinsch

vs.

St. Louis, Southwestern Railway Company.

The premises considered, it is adjudged by the Commission that the St. Louis, Southwestern Railway Company hath incurred the penalties denounced by the eighteenth section of the Act of March, 1899, of this State, creating a Railroad Commission and defining its powers and duties to shippers *in disregard of the duties imposed upon it by Section* 10 *(Kirby's Digest,* 6804*)* of said Act of March, 1899, and the rules of the Commission governing the transportation of property as outlined in its order effective August 5, 1905, in this, that said carrier did at its station in the town of Stuttgart, Arkansas, unlawfully and *in disregard of its duty as a carrier* refuse or fail to furnish cars for hay shipments upon the requisition of the complainant,

Philip Reinsch, said cars being ordered of the agent of the St. Louis, Southwestern Railway Company, at Stuttgart, Arkansas, to be placed at Stuttgart, Arkansas, as follows:

October 30, 1905, twelve cars for shipment to Texarkana, Ark.

October 30, 1905, one car for shipment to Hot Springs, Ark.

October 30, 1905, one car for shipment to Anderson, Ark.

November 20, 1905, fifteen cars for shipment to Texarkana, Ark.

December 12, 1905, twelve cars for shipment to Texarkana, Ark.

January 20, 1906, nine cars for shipment to Texarkana, Ark.

January 20, 1906, one car for shipment to Hot Springs, Ark.

It is therefore ordered by the Commission that the State of Arkansas doth have and receive of and from the St. Louis Southwestern Railway Company its penalty for disregarding the duties *imposed upon it by law,* and the rules of the Railroad Commission of this State aforesaid.

And to that end it is ordered by the Commission that the Secretary of this Commission make out a true and perfect transcript of this order, and that same be certified under the seal of this office and forthwith forwarded to the Honorable F. E. Brown, Prosecuting Attorney of the Seventeenth Judicial District of the State of Arkansas. It is further ordered, that within fifteen days from the receipt of said transcript, that the said Prosecuting Attorney institute suit in the name of the State of Arkansas, in Arkansas County Circuit Court, against said Railway Company, to recover the

penalty for its dereliction of duty as aforesaid as in such cases made and provided by law.

I hereby certify that the above is a true and correct copy of an order this day issued by the Railroad Commission of Arkansas.

Given under my hand and the seal of the Railroad Commission of Arkansas, in the city of Little Rock, this the fourteenth day of February, 1906.

W. E. FLOYD, Secretary."

Defendant in error desires to correct the erroneous statement made in paragraph 3, on page 3, of the statement for plaintiff in error, which says that:

"Reinsch, during this time, had ordered from the plaintiff in error, one hundred and ninety-eight cars, all to be delivered within five days from the respective date in which they were ordered. (Pr. Tr., p. 71.) Of these fifty-one were not delivered."

The above is incorrect in that the record referred to (Pr. Tr., p. 71) does not show that the one hundred and ninety-eight cars were to be delivered in five days and does not show that all these one hundred and ninety-eight cars were furnished except the fifty-one referred to in this suit. On the contrary it shows that Reinsch ordered one hundred and ninety-eight cars during this period (Pr. Tr., p. 71), and that the railroad furnished during November, December and January, only fifty-one cars out of the one hundred and ninety-eight ordered, or about twenty-five per cent of

the cars ordered (Pr. Tr., p. 43, deposition agent of plaintiff in error), and that the cars ordered October 30th had not been furnished even as late as January 20th thereafter, and this suit is for failure to furnish the cars *at any time*—not within five days.

II.

LAW OF ARKANSAS CONCERNING CARS AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, WHICH RECOGNIZES AND ESTABLISHES THE COMMON LAW EXCUSES FOR FAILURE TO FURNISH SUFFICIENT SHIPPING FACILITIES.

Section 6804 of Kirby's Digest of Arkansas, hereinbefore referred to, requiring railroads to furnish cars, was enacted March 11, 1899, and the Supreme Court of Arkansas construed this section on January 6, 1906, in case of *St. Louis, Southwestern Railway Company vs. Clay County Gin Company*, 77 *Ark.*, 362, as follows:

"The statute did not intend to make the duty of carriers to furnish transportation facilities an absolute one, for it would be unreasonable to conclude that the legislature intended to impose upon them duties that under certain conditions could not be anticipated by them, and which it would be impossible to perform, and yet, for such non-performance, to exact of them

heavy penalties. The statute under consideration is but declarative of the requirements of the common law as to the duty of furnishing transportation facilities. After declaring what that duty is, it prescribes the penalty for its non-performance.

A common carrier for such goods as he undertakes to carry is bound to provide reasonable facilities of transportation to all shippers at every station who, in the regular and expected course of business, offer their goods for transportation. The carrier is not required to provide in advance for any unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping, or even in receiving goods for shipment, until such emergency can, in the regular and usual course of business, be removed. *Little Rock & Ft. Smith R. Co. vs. Oppenheimer,* 64 *Ark.,* 271, 279; 4 *Elliott Railroads,* 1470; *Hutch, Car,* 292; 6 *Cyc.,* 372, *Note* 2."

Plaintiff in error was a party to the above suit and it was in that case excused for failing to furnish cars in October and November, 1902, because of an "unusual and unexpected demand."

In *St. Louis, Southwestern Railway Company vs. Leder,* 79 *Ark.,* 59 (opinion rendered May 14, 1906), the Supreme Court of Arkansas reaffirmed the above doctrine and reversed the case to enable the same railroad (which is plaintiff in error) to show an "unusual and unexpected and unprecedented demand" for cars in November and December, 1903, as an excuse for failing to furnish cars in November and December,

1903. In the case now under consideration, plaintiff in error claimed there was an "unusual" demand in 1905.

In *St. Louis, Iron Mountain & Southern Railway Company vs. Wynne Hoop and Cooperage Company,* 81 *Ark.*, 373 (decided January 7, 1907), the court again said:

"This court in recent cases has declared the duty of common carriers, by the common law and by statute, to furnish transportation facilities for such goods as they undertake to carry to all who may apply for same in the regular and expected course of business. Where there is an unprecedented and unexpected press of business, such as the carriers could not by ordinary prudence in the usual course of traffic have contemplated, he is excused for not having anticipated and provided against such extraordinary conditions." (Citing its former cases.)

On December 16, 1907, the opinion of the Supreme Court of Arkansas was rendered in the case now being considered, which opinion is as follows (Pr. Tr., p. 91):

"Philip Reinsch, a dealer in baled hay at Stuttgart, made demand on appellant railroad company for cars during the season running from October 30, 1905, to January 20, 1906, and was furnished some cars; but the railroad company failed to furnish him within those dates fifty-one cars, which were properly demanded for various shipments to be made to different points within the State of Arkansas.

Reinsch filed complaint before the Railroad Commission, and on a hearing, the Commission found that the company had violated Sections 10 and 18 of the Act of March 11, 1899, which are Sections 6803 and 6813 of Kirby's Digest; and a rule of the Commission, effective August 5, 1907, known as Order 305 (which will be found in the statement of facts); and directed the Prosecuting Attorney to bring suit pursuant to Section 6813, Kirby's Digest.

This suit resulted; and, the finding of the Commission making a *prima facie* case against the company under Section 6814, Kirby's Digest, the company assumed the burden of excusing itself for failing to furnish the cars in question; the failure was acknowledged.

The first question urged is that the Commission did not have authority to make said Order 305. Aside from its effect in this case the question is academic because in Section 3 of the Act of May 28, 1907, and Section 22 of the Act of April 19, 1907, express authority may be found for the rules on the subject. *Nor is the order important in this case; there was not failure to furnish cars within the five days allowed therein fixed, but a failure to furnish at all the cars in question.* Section 6803, Kirby's Digest (expressly named in the suit as one violated), requires the carrier to receive, load, unload, transfer, store and deliver all property offered for shipment, at charges not greater than those named in posted schedules; this would undoubtedly include the duty of furnishing cars on proper demand. Section 6804 also requires the furnishing of cars; and Section 6808 renders a violation of these requirements a cause of action for damages by the injured shipper. Section 6813 renders the violation of any of these requirements (and also legal orders of the Commission) cause for incurring the penalty herein sued for. These statutes are merely declaratory of common law rights

(Ry. vs. Clay Gin Co., 77 Ark., 357) for which these statutory remedies are provided.

The counsel attack as unreasonable and void Order 305 for the reason stated by the Supreme Court of the United States in *Ry. vs. Mayes,* 201 *U. S.,* 321, wherein a statute of Texas, somewhat similar to this order, was under review. As the order is unnecessary to the maintenance of this suit, *as the suit is also predicated upon statutes which cover every question in it,* a decision of it would be out of place.

The only other question requiring consideration is whether the undisputed evidence introduced by appellant presented a sufficient excuse for the failure to furnish the cars. The question has given the court much concern, and the cause has been resubmitted for argument upon it; and after the benefit of additional arguments and briefs, the court has reached its conclusion slowly.

It will be found in the Reporter's statement that the evidence of appellant (and its evidence was all there was upon this subject) showed that during the time of the failure to furnish the cars in question the railroad company had sufficient equipment to meet the demands of its traffic, and there was on its line no extraordinary or unusual or unprecedented rush of business; but with its own car equipment on its line there was no time when any industry would have suffered from want of cars. In fact the appellant was shown to have a larger car equipment than the average freight carrying road; and the failure to furnish cars was wholly due to an inability to regain its cars which were sent to other roads carrying freight from its own line. Over ninety per cent of the railroads of the United States belong to the American Railway Association, which promulgates rules for a system of interchange of cars among its members. The appellant is one of its members and governed by its rules. The appellant is an originating

line, originating about seventy per cent of its traffic and receiving about thirty per cent.

To illustrate its situation: during the month of November, 1905, it had in revenue service 9517 cars, of which it averaged daily 3982 in use on its own line, 5525 off its own line and 2519 foreign cars in use. In other words, a daily balance of exchange of 1473 cars was against it, and its shortage in cars was only about 650 per day. Unless there was an efficient car service exchange and return, it is apparent that an originating road would soon be depleted of its equipment, especially in time of great traffic in the east as there was within the time in question.

In ordinary circumstances, the proper average time for the return of a car is twenty-two days; during the time in question it was three months or more. The rules of the American Railway Association provide a charge of twenty-five cents a day for thirty days; after thirty days, and after ten days notice to the road holding it, then one dollar per day was charged. This twenty-five cents charge was not for revenue, but was fixed as a basis of settlement; the charge after thirty days of one dollar for each car was a penalty to hurry its return.

The heavy business in the last two or three years before the time in question caused serious drains on appellant and other originating lines. About two years before this time a per diem of twenty cents per day per car was put in, and it was increased to twenty-five cents, and after the time in question in this suit, and owing to the serious effect on originating lines during the season in question, it was increased to fifty cents per day.

The system has proved ineffective to return cars for the past two or three years. In times of dull traffic, appellant's cars would be sent back to its lines to

stop this charge, and in the short season of moving the crops over the country, when the demand was great everywhere, and traffic congested in the east, then the foreign roads preferred paying the per diem to returning the cars. It was cheaper to non-originating roads to pay this small charge than to own more equipment.

The general superintendent of the appellant says: "In a congested state of traffic, the per diem charge would not have any effect in getting the cars returned, for other roads would much rather pay twenty-five cents and keep the cars than to return them." This same official says that it was customary in order to avoid the penalty, to shift the cars within thirty days to another line where it can remain for another thirty days without other penalty than the twenty-five cents per diem. It is one of the rules of interchange of cars that a foreign car must be loaded and moved only in the direction of home; and had this rule been observed, appellant would not have had a shortage, but it was habitually disregarded ever since the traffic in the last few years grew heavy.

The evidence indisputably establishes that it is a benefit to the shipping public to interchange cars and not to refuse to send cars off the line. Broadly stated, this evidence presents this issue: Railroad companies who interchange cars with appellant here failed in their duty to appellant in keeping, instead of returning its cars, and appellant correspondingly failed in its duty to its shippers, including the complainant in this action; shall the shipper or the carrier suffer for this default?

It is unquestionably good for the public that the railroads of the United States have a system of interchange of cars, instead of each road hauling to its termini only, and thereby force reloading and reshipment. The inconvenience and expense of such a system would at once condemn it as failing to meet public

requirements. It is unquestionably the policy of both State and Federal legislation to facilitate if not require an interchange of cars. The most recent illustration of this policy is found in section 17 of the Act of April 19, 1907 (Acts 1907, p. 463).

For one railroad company to be an Ishmaelite amongst its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England, and their fruits to the north, and their lumber and coal to the four corners of the union without change from consignor to consignee.

The beneficient and useful purpose of car service associations formed to facilitate the interchange and movement of cars is well stated in *Ry. vs. George,* 82 *Miss.,* 710; and the same court in a thoughtful and well considered decision held that a car service association was not a combination in restraint of trade and obnoxious to the anti-trust statute.

Yazoo and M. Ry. vs. Searles, 68 *L. R. A.*, 715.

The Kentucky court says what the carriers may lawfully do for themselves they may do through a common agent and the reasonable rules of a car service association are enforceable.

Ky. Wagon Mfg. vs. Ry., 32 *S. W.*, 596.

The result of these and other decisions as summed up in an excellent text book is that these associations are lawful and their rules and regulations, when reasonable, will be upheld.

2 *Hutchinson on Carriers* (3*rd Ed.*), *sec.* 861.

Mr. Elliott says that such associations formed for the purpose of making and enforcing reasonable regulations to facilitate business and secure the prompt

loading, unloading and return of cars can not be held illegal upon the ground that the constituent companies by becoming members surrender their corporate functions and control to the association.

4 *Elliott on Railroads, sec.* 1568.

The right of carriers to engage in such associations and to enforce reasonable rules is well stated by the Virginia court in *N. W. Ry. vs. Adams,* 22 *L. R. A.,* 530; but in sustaining the reasonableness of the rule in that case the court said: "The railroad company as a common carrier, is bound to furnish cars for transportation of freight; and they must have control over their cars in order to perform their duties to the public."

The Kentucky court, in *Ry. Co. vs. Reed,* 10 *Ky. L. Rep.,* 1020, referred to in note to 43 *L. R. A.,* 227, said: "To allow that it (the carrier) may be excused for failure to furnish cars by showing that it allowed its cars to be taken to other roads beyond the power to control them would be to allow that it might fail to supply itself with sufficient facilities to transact its business on its own lines. * * * Means not under the control of the carrier are just as hurtful as means not provided."

The evidence here shows that the appellant company lost control over a majority of its cars, knowing that the rules for their return were insufficient to insure their return. Experience for the last two or three years had demonstated that the rules for return of cars were insufficient. At the time the cars were needed to move the crops, they were in the east earning less than interest and wear; and when they could be spared by appellant and probably bring in a small revenue from demurrage charges elsewhere, they were returned home.

The system of interchange of cars which appellant suffered to prevail as controlling its service had broken down completely; its rules were habitually disregarded, and the return of the cars within a reasonable time not produced; and yet it is offered as the excuse for a failure to comply with its duties to the public. This system caused the railroad company to lose control of its equipment and a continuance of its inefficient service is an abdication of its corporate functions to a voluntary association irresponsible for losses to its patrons and probably irresponsive to the just demands of the appellant company itself. It may be better for the appellant to suffer these ills than to sail under a black flag and refuse to send its cars beyond its line; that is not a question for the court. Until the appellant carrier shows reasonable rules and regulations for the interchange of cars, it can not avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred.

Judgment affirmed."

St. Louis, Southwestern Ry. Co. vs. State,
85 *Ark.*, 201.

Plaintiff in error, on pages 24-25 of its brief, refers to the more recent opinion of the Arkansas Supreme Court in case of *Oliver vs. Chicago, R. I. and P. Ry. Co.*, 89 *Ark.*, 467, rendered March 1, 1909. Plaintiff in error says: "That the court conceded that the act under consideration was void as to interstate commerce shipments." The court said: "Upon this point we express no opinion." While the case above referred to does not refer to the statute in considera-

tion in this case, yet inasmuch as one paragraph thereof is copied in brief of plaintiff in error, another part in connection therewith will be here copied as follows:

"At first view, there seems to be ample room for confusion and conflict between Federal and State laws dealing with commercial subjects, and many adjudications show this to be true. The difficulty, however, when present, is in the nature of the case or in the nature of the legislation. When, as in this case, the controversy is connected with the shipment of goods, the difficulty can not arise, for every shipment will be to a point within the State or to a point without the State, and consequently one for the application of the Federal law, or one free from its contact. It seems that there could, as to domestic business, be no objection to the continued enforcement within a State of a statute broad enough in its terms to include interstate business. To the extent that it contemplaed, or in its operation effected, any regulation of interstate business, it would be void; but that would be the limit of its invalidity, and in all other matters it would stand to be enforced.

This view would seem to be reasonable, and that it is the view of the Supreme Court of the United States, can clearly be gathered from the cases of *Central of Georgia Railway Company vs. Murphey*, 196 *U. S.*, 194, and *Houston and Texas Central Railroad vs. Mayes*, 201 *U. S.*, 321. In this last case we find the following pertinent statement: "As the power to build and operate railways, and to acquire land by condemnation, usually rests upon State authority, the legislature may annex such conditions as they please with regard to *intrastate* transportation, and such rules regarding *interstate* commerce as are not consistent with the general right of such commerce to be free and unobstructed."

It is conceivable that a State regulation of domestic commerce could, in its operation, impair the usefulness of common carriers as to interstate business. There is, however, nothing in the act under consideration to prompt us to say that its enforcement as a State regulation would necessarily have such effect.

It is next contended that the act is unconstitutional because its requirements that cars be furnished is absolute and unconditional; that is, it does not mention anything that would justify or excuse the failure. In support of this contention, we are referred to the case of *Houston and Texas Central Railroad vs. Mayes, supra.* We can not accept it as controlling. The Texas statute there involved, like the one under investigation, required the cars to be furnished; but unlike the one here in question, it had a proviso as follows: "That the provisions of this law shall not apply in cases of strike, or other public calamities." This provision could well bring in for application the doctrine that the exception strengthens the rule, and that the statute by enumerating these excuses, intended to exclude all others."

BRIEF.

I.

THE VALIDITY OF ORDER, NO. 305, OF THE RAILROAD COMMISSION, IS IMMATERIAL.

This suit does not depend upon the validity of the order of the Railroad Commission. It is a suit based upon failure to furnish cars *as required by law.* The statute authorizes this suit for *either* a violation of *"any of the provisions of this act"* or for a violation of a valid Railroad Commission order, the only condition in either case being that the Railroad Commission order suit, which it did in this case on February 14, 1906. One "of the provisions of this act" was the provision declaring the common law duties of the carrier to furnish cars, as decided by the Supreme Court of Arkansas in three cases prior to its decision in this case (*supra.*)

On this theory, the order of the Railroad Commission, directing the institution of this suit, authorized the suit against the plaintiff in error *"for disregarding the duties imposed upon it by law."* (Pr. Abstract, p. —.) And following out this theory, the complaint alleged among other things as follows:

"That said defendant as a railroad and a common carrier * * * *is subject to the laws of the State of Arkansas*, regarding railroads.

Said defendant in said county and State aforesaid *unlawfully and in disregard of its duty as a carrier* * * * failed and refused to furnish said cars or any of them at any time.

The defendant violated * * * the duty *imposed upon it as a common carrier by law* in the way and manner hereinbefore set out and *contrary to the form of the statute* in such case made and provided, and by reason thereof has subjected itself to the *penalty prescribed by law* in such cases made and provided; and the plaintiff ought to have and recover from said defendant for said violation the maximum penalty." (Pr. Tr., pp. 1-2.)

On this theory too, the instructions to the jury presented the *law* and *not* the order of the Railroad Commission, and declared the duty of carriers to furnish cars *"without undue and unreasonable delay"* (*not in five days* as in the Commission Order 305) and declared such duty in the language of the Supreme Court declaring the common law duty to furnish cars (and not in the language of Order No. 305 of the Railroad Commission.) (Pr. Abstract, p. 80.)

Accordingly, the Supreme Court of Arkansas sustained this suit as one instituted for a violation of statute (not for a violation of rule of Railroad Commission), the language of the opinion of the lower court on this point being as follows:

"The first question urged is that the Commission did not have authority to make said Order 305. Aside from its effect in this case the question is academic, because in Section 3 of the Act of May 28, 1907, and Section 22 of Act of April 19, 1907, express authority may be found for rules on the subject. Nor is the order important in this case; there was no failure to furnish cars within the five days therein fixed, but a failure to furnish at all the cars in question. Section 6803, Kirby's Digest (expressly named in the suit as one violated), requires the carrier to receive, load, unload, transfer, store and deliver all property offered for shipment. At charges not greater than those named in posted schedules; this would undoubtedly include the duty of furnishing cars on proper demand. Section 6804 also requires the furnishing of cars; and Section 6808 renders a violation of any of these requirements a cause of action for damages by the injured shipper. Section 6813 renders the violation of any of these requirements (and also legal orders of the Commission) cause for incurring the penalty therein sued for. These statutes are merely declaratory of common law rights (*Ry. vs. Clay Gin Co.*, 77 *Ark.*, 357) for which these statutory remedies are provided."

It would therefore seem that the question as to whether the order of the Railroad Commission No. 305 *was valid, is immaterial in this case.*

But even if the Order No. 305 of the Railroad Commission were essential, it is difficult to see any good objection to it. The order is assailed as unreasonable on the ground that "it contains no exception whatever, but requires the cars ordered to be furnished within five days in all cases and under all circumstances."

If this were the meaning of the order, its invalidity could be conceded; but the language of the order is, "The railroad company shall furnish them cars" and this is the same language used in Kirby's Digest of the Laws of Arkansas, Section 6804, which the court construed as merely declaratory of the common law rule, and as impliedly admitting the common law exceptions. The order should be construed, if reasonably possible, to uphold its validity; and the Supreme Court of Arkansas has not construed this order as creating an absolute duty to furnish cars, but on the contrary, has in effect said, that the duty of a railroad company to furnish cars is no broader than the common law duty, whether the railroad be notified to furnish cars under the statute or the rule of the Railroad Commission.

This order of the Railroad Commission should not be required to state more than the general common law duty, leaving the common law exceptions to be implied; it would be very difficult to prepare a rule that would expressly mention all reasonable excuses that might be made on behalf of a carrier. But attention is requested to the following clauses in the order (especially in connection with the opinion of Arkansas Supreme Court), holding duty to furnish cars not an absolute one:

"The period during which the movement of freight is suspended on account of accident or any cause not within the power of the railroad to prevent, shall be added to the free time and allowed in this rule, and counted as additional free time."

"The Commission reserves the right on its own motion to suspend the operation of these rules * * * whenever it shall appear that justice demands such action."

II.

THERE IS NO FEDERAL QUESTION INVOLVED.

The statutes and decisions of the Arkansas Supreme Court do not seek to make the duty of railroads to furnish cars an absolute one and the Arkansas law is simply declaratory of the common law. The cars not furnished in this case were ordered for *shipments within the State of Arkansas*—intrastate business. (Pr. Abstract, p. —.)

Plaintiff in error in its brief on page 25 quotes a later decision of the Arkansas Supreme Court as follows:

"The failure to furnish cars under the terms of the act under investigation will establish prima facie a breach of duty on the part of the Railroad Commission, though it will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it possible to answer all demands made for cars for intrastate business would apparently be within the limit

of proper defenses in cases of *demands too unusual to be foreseen,* and viewed in this way the act is relieved of the imputation of burdening interstate commerce."

Plaintiff in error then on page 25 of its brief, further says:

"We concede that to be a proper statement of the law and submit that the record of case at bar will show that this defense was fully made by the defendant and that it did not avail under the construction placed upon the laws by the Supreme Court of Arkansas."

The Supreme Court of Arkansas finds in its opinion in this case, as a matter of fact, that there was "no unusual, extraordinary or unprecedented rush of business" to excuse the carrier's default. (Pr. Abstract, p. 92.) It would therefore seem that there is no Federal question involved according even to plaintiff in error's contention.

III.

THE LAW OF ARKANSAS WHICH IS SIMPLY DECLARATORY OF THE COMMON LAW REQUIRING RAILROADS TO FURNISH CARS, SUBJECT TO REASONABLE EXCUSES, IS NOT A BURDEN ON INTERSTATE COMMERCE.

The entire argument of plaintiff in error seems to be based on the erroneous assumption, that the common law requiring carriers to have and furnish sufficient

cars for their usual and ordinary demands, is inconsistent with and supplanted by the Congressional and State law forbidding discrimination and requiring all cars possessed to be furnished to all shippers alike, intrastate and interstate, without discrimination.

A carrier owes two duties: The older common law duty, redeclared by statute in Arkansas, to have and furnish sufficient cars for usual demands, and the other duty of furnishing such cars as it has without discrimination. The decision of the court recognizes in times of shortage of cars—in fact all times—cars must be furnished without discrimination, but the carrier is nevertheless liable for cars not furnished, unless such failure is due to unusual demand or other proper defense. It is no defense for a carrier to say it is not liable for failing to have insufficient cars because it had to furnish what it did have without discrimination. That the State of Arkansas does not desire a carrier to violate the Federal law against discrimination is shown by the fact that it has a similar law forbidding discrimination. The common law requiring that a carrier must have sufficient cars for all usual demands is as beneficial to interstate shippers as intrastate shippers. The Congressional law against

discrimination was intended to increase the liability of a carrier—not to decrease their liability by releasing them from the obligation to have sufficient facilities.

In fact, no reason is seen why the law in question would not be good even as interstate shipments under the doctrine of *Houston and Texas Central Ry. vs. Mayes,* 201 *U. S.,* 321, though the question at issue is confined to intrastate shipments. Because the Arkansas law with reference even to interstate shipments is not open to the objections made to the Texas law. The Texas law provided for but one defense, viz: "Strikes or other public calamity" and the decisions of the Supreme Court of Texas excluded the common law defenses. The Supreme Court of the United States in the Mayes case, accepting the construction placed on the Texas law by the Texas Supreme Court as excluding the comomn law defenses, held the law unreasonable as to interstate shipments. But the Arkansas law is construed as subject to the common law defenses, and the objection urged in the Mayes case does not therefore apply.

Even without the common law exceptions, and even as to interstate shipments, the United States Supreme Court said in the Mayes case:

"It may be admitted that the statute is not far from the line of proper police regulation."

With further reference to the Mayes case above mentioned, we beg to refer to a discussion thereof in *Calvert on Regulation of Commerce, page* 5, *preface* 160, 96-97 and 77-78.

Referring further to interstate shipments, plaintiff in error suggests in its brief, page 31, that the interstate commerce Act of 1887 required railroads to furnish cars, thereby covering the same subject matter as the State legislation, but the section of the act referred to has been otherwise construed.

10 *I. S. C. Rep.*, 636.
2 *I. C. C. R.*, 116-118.
109 *Fed. Rep.*, 831.

In other words, the Federal law made no requirement concerning furnishing of cars, except to prevent discrimination. And a reasonable State law on the subject even as to interstate commerce, would be valid until Congress acted on the specific points covered by the State legislation in such a way as to make the State statute inconsistent with the Federal law. And even if the interstate commerce Act of 1887 had applied to furnishing of cars beyond discrimination, and even

if the law in this case were being tested with reference to interstate shipments, the State law declaratory of the common law would be in aid of interstate commerce, Federal policy and Federal statute, and not inconsistent with it.

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